Public Utilities

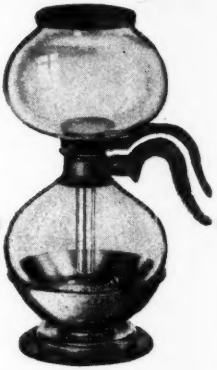
FORTNIGHTLY

March 16, 1939

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

Let Coffee Add Load to Your Line

. . . More than
67 Billion cups brewed
in the U. S. in 1938!



PUT the thousands of cups of coffee in your community into Silex *electric* models and your domestic load will go up thousands of KWH.

The Silex Anyheet Control Model, for example, will add an average of 97 KWH to your domestic load. Multiply a single installation by the thousands that can be placed in your community, and Silex load-building power becomes apparent.

Delray Electric Table Model ... $4.95
With Anyheet Control (keeps coffee any heat) $5.95
Pyrex Brand Glass used exclusively.

FOR YOUR PACKAGE ASSORTMENT

If you are planning to merchandise an appliance package, be sure to consider the Silex Glass Coffee Maker. It's been the backbone of many successful utility company promotions. Along with other popular appliances, the $4.95 Electric Table Model Silex will help you build a package that's sure to be a hit. Write for information and suggestions.

The Silex Company, Dept. P-3, Hartford, Conn.

Creators of the Glass Coffee Maker Industry.

Genuine SILEX GLASS COFFEE MAKER
TRADE MARK REGISTERED U.S. PAT. OFF.

BREWING COMPLETED WITHOUT REMOVING GLASS FROM STO

Editor—HENRY C. SPURR
Associate Editors—ELLSWORTH NICHOLS, FRANCIS X. WELCH, NEIL H. DUFFY
Contributing Editor—OWEN ELY

Public Utilities Fortnightly

VOLUME XXIII *March 16, 1939* NUMBER 6

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

Publication Office ..... CANDLER BUILDING, BALTIMORE, MD.
Executive, Editorial, and Advertising Offices ..... MUNSEY BUILDING, WASHINGTON, D. C.

PUBLIC UTILITIES FORTNIGHTLY, a magazine dealing with the problems of utility regulation and allied topics, including also decisions of the regulatory commissions and courts, preprinted from *Public Utilities Reports, New Series,* such Reports being supported in part by those conducting public utility service, manufacturers, bankers, accountants, and other users. Entered as second-class matter April 29, 1915, under the Act of March 3, 1879. Entered at the Post Office at Baltimore, Md., Dec. 31, 1936; copyrighted, 1939, by Public Utilities Reports, Inc. Printed in U. S. A.

PRICE, 75 CENTS A COPY ANNUAL SUBSCRIPTION, $15.00

Pages with the Editors

DEMOCRACY has come a long way since the days when the Founding Fathers worried over such matters as property restrictions on the right to vote. For years the franchise has been extended to all adult citizens (other than convicts, lunatics, and inhabitants of the District of Columbia) without regard to race, color, sex, or financial responsibility. More recently it has been carried—through unofficial channels—pretty far afield. Expert analysts of public opinion, such as Dr. George Gallup, can now tell us, on remarkably short notice, what is the will of the people on such divergent topics as a third term for Roosevelt, curbing Federal expenditures, matters of foreign policy, and who should play Scarlett O'Hara in that long-deferred movie classic, *Gone with the Wind.*

WHERE, today, are the conservatives who used to cry out against the initiative and recall provisions of Western state constitutions as putting in the hands of the rabble the power to decide questions they knew nothing about? Answer: They are probably waiting as eagerly as anyone else to read the latest results of a Gallup poll, or a *Fortune* poll, or other polls on some passing issue of popular interest. What would Thomas Jefferson say if he were told that a certain Senator could not make up his mind on a pending confirmation vote on a presidential appointment until he had a chance to read the latest syndicated nose count?

HAROLD BRAYMAN

He finds Washington skies clearing somewhat for the utilities.

(SEE PAGE 323)

J. E. BULLARD

No dam can serve two or three purposes without somebody getting short changed.

(SEE PAGE 343)

YES, democracy moves fast these days. There may be some truth, as well as humor, in the current jokes about the approaching time when the election day will be a real holiday; a day during which we can all go fishing or golfing with clear consciences, armed with a foreknowledge that the outcome had been decided (for all intents and purposes) in last Sunday's newspapers. But if democracy moves fast, politicians move faster. There is enough natural inertia in public opinion for a professional poll taker to take a sounding as of a given day without fear that it will be out of date before it gets into print. How few are the politicians who cannot easily change their convictions overnight—sometimes within the short space of a telephone call?

IT is for this reason that an informal poll of congressional opinion (even if fairly complete) on any particular legislative issue has about as much lasting value as the stock mar-

ket report in your favorite edition. How then is the business executive, faced with the necessity for making future plans and commitments, going to judge the probable temper of Congress on bills which may vitally affect his business? There is no sure or even approximate method. The nearest approach would be an analysis of the past records of individual Congressmen, weighed in the light of prevailing trends and special circumstances, if any.

To use a vulgar but simple comparison, these are, in principle, about the same factors which race track handicappers consider: Past performance, morning clocking, and current track conditions. Needless to say, handicappers often err; but not so much as the rest of us at a race track. This is probably the reason why both handicappers and race tracks stay in business.

APPLYING similar factors to congressional performance (with all due respect) sounds like a large order; one that would require the services of a Merlin. Yet such is the task undertaken by our political Merlin—HAROLD BRAYMAN—in the leading article in this issue. MR. BRAYMAN may be recalled by some readers as the veteran Washington correspondent of the *Philadelphia Public Ledger*. In this article he essays an analysis of the still new 76th Congress in terms of interest to utilities and those interested in utility regulation and ownership.

THE second article in this issue is a discussion of political rivalry for public support, which concerns utilities probably more than any other single major question. It is the broad issue of choosing between public ownership or public regulation of private utilities, done in realistic style by ERNEST ABRAMS, utility editor of *The Financial Reporter*. MR. ABRAMS thinks that it would be desirable for the people to make a decision one way or the other about the operation of utility services—especially the electric power business.

BUT the history of foreign countries, as well as our own, on utility development seems to point to the generality that people don't usually make such decisions on their merits. Further, it would seem that people of different countries don't make such a decision at all if they can avoid it, and when they do it is more often the collateral result of something entirely apart from the utility business *per se*, such as a military emergency or an ideological revolution.

BARRING such cataclysmic changes, public utility operations, both here and abroad, have a tendency to rock along just about in the same manner as they were commenced and developed. In certain European countries different forms of utilities came under government operation almost from the beginning—and stayed that way. On this side of the water, private development of utility service has been the general rule. As a system grows up, so it is taken more or less for granted. It is when an abrupt change is suggested that controversy breaks out and disputants talk excitedly about socialism, feudalism, and monopoly.

ERNEST R. ABRAMS

How much longer can America straddle the issue of public v. *private ownership?*

(SEE PAGE 334)

A RECENT report of a special investigating committee of the Texas senate has given a new timeliness to our third article on multiple use of dams for power, navigation, and flood control by J. E. BULLARD, well-known business writer of Central Valley, N. Y. The Texas committee was appointed to find out if Buchanan dam could possibly have been more of a help than a hindrance to the damaging floods on the Lower Colorado river which occurred in that state last summer. It decided that if the main idea of the dam was to make power, the directors of the Lower Colorado River Authority should not be held responsible if the flood waters slopped right over a dam already stocked with water to keep its turbines turning. If, on the other hand, the principal purpose of the Buchanan dam was to prevent floods, the committee thought the LCRA might have reserved more space for them, even if power production would suffer as a result.

THIS general conflict in the use of multiple dams is discussed in MR. BULLARD'S article.

THE next number of this magazine will be out March 30th.

The Editors

In This Issue

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 1–64, from 27 P.U.R.(N.S.)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

CHARLES L. GIFFORD
U. S. Representative from Massachusetts.

"A $44,000,000,000 debt is not a good rampart for national defense."

W. J. CAMERON
Ford Motor Company.

"It is nice to talk about enterprise. It is better to show a little of it."

EDITORIAL STATEMENT
Broadcasting.

"Thus protection of radio is really the first line of defense for the press."

WENDELL L. WILLKIE
President, Commonwealth & Southern Corporation.

"Liberalism today means protecting the people against the domination of big government."

JOSEPH C. O'MAHONEY
U. S. Senator from Wyoming.

". . . continued expansion of discretionary government control over business is dangerous."

EDITORIAL STATEMENT
Electrical World.

". . . a combination of lawyers on one side and politicians on the other can make any business a precarious business."

FROM A LEGISLATIVE NEWS ITEM
St. Louis Post Dispatch.

"The Attorney General's brief added that any business or industry afflicted with a public interest could be validly regulated as a utility."

ROBERT M. COOPER
Special Assistant to U. S. Attorney General.

"From beginning to end, the regulatory process operates in an atmosphere of more or less intense antagonism. In certain respects this is its outstanding defect as a permanent device for meeting the public utility problem."

CHARLES R. HOOK
President, American Rolling Mill Company.

"It is not reasonable to expect that the great rank and file of our people will militantly rise to the defense of the free enterprise system unless they can see the relation between its continued operation and their personal well-being."

FRANK FAGEOL
President, Twin Coach Company.

"Until you do answer in your own mind, and prove by sound logic that the plan [postalization of railroad rates] is economically unsound, you had just as well try to fight a windmill as to try to fight the public interest and final adoption of this plan."

JAMES J. DAVIS
U. S. Senator from Pennsylvania.

"No task should be committed to the government which can better be performed through coöperative action of the people in a voluntary and private way."

EDITORIAL STATEMENT
The Dallas News.

"The changing authority that is characteristic of democratic government tends to keep government clean, but it has never been noteworthy for keeping government efficient."

BURTON K. WHEELER
U. S. Senator from Montana.

"Highly commercialized programs are no greater an evil than propaganda foisted upon the listening public by various governmental agencies under the guise of being educational."

RICHARD L. NEUBERGER
Writing in Survey Graphic.

"The two Columbia river dams [Bonneville and Grand Coulee] will have a greater capacity than the aggregate output of all the other major Federal power projects built, under construction, or planned."

JOHN RAYMOND MCCARL
Former United States Comptroller General.

"The plight of the railroads has been made worse by all sides 'leaving it to government'—so bad, indeed, that the ways are greased for the carriers to skid into government ownership and political use."

HERBERT M. BRATTER
Writing in Nation's Business.

"It [the FCC] is almost daily in the news, now as an inquisitor, now as congressional storm center; here as appraiser of 'public interest, convenience, and necessity,' there as chaperone to young listeners."

DONALD D. CONN
Executive Vice President, Transportation Association of America.

"... we should not fear monopoly in public service if we will but review the record of the American Telephone and Telegraph Company. In this depression it has paid its dividends, treated fairly with labor, improved its service, and reduced its rates."

BEN W. LEWIS
Professor, Oberlin College.

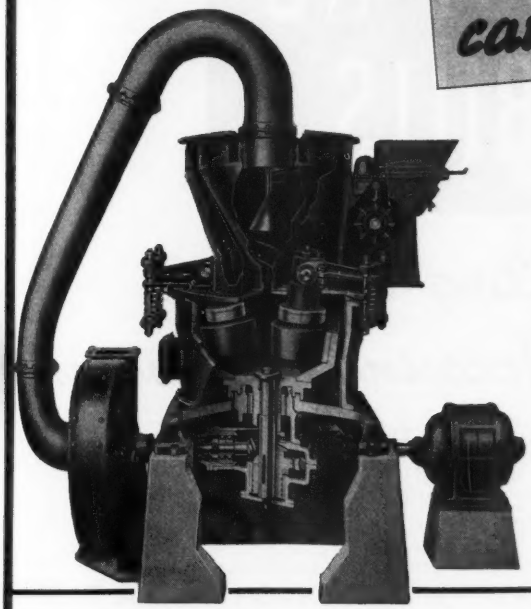
"Regulation, together with government competition, can transform private utilities from pensioners assured by law of a comfortable living into business enterprises fighting for every last nickel's worth of custom that efficiency and promotional pricing will afford."

EDITORIAL COMMENT
Industrial News Review.

"You'd think nothing of it if your next-door neighbor 'borrowed' a cigarette. But you would regard it as a presumption if he asked permission to run a cord to one of your electric light outlets in order to operate his radio for the evening. Yet, the fact is, based on average domestic power rates, that the cost of one cigarette would more than pay the cost of operating most radios for several hours!"

600° AIR

the BOWL MILL can handle it!



Special Advantages of the BOWL MILL

Ability to Handle Hot Air. Positive Lubrication. Quiet, Vibrationless Operation. Convenient Adjustment.

In addition to such commonly accepted measures of pulverizer performance as reliability, power consumption, maintenance, capacity and fineness, there are other highly important considerations. For example, the ability of the mill to effect satisfactory reduction of the moisture content of raw coal. Some years ago, this important function was performed by cumbersome, expensive and never completely satisfactory apparatus external to the mill. In recent years, coal drying has been accomplished in the pulverizer by supplying preheated air. The extent of drying, however, particularly with coal having a high initial moisture content, has been limited by the ability of the pulverizer to handle air at temperatures high enough to effect satisfactory drying without impairing mill operation.

Until about the middle of 1935, the maximum air temperature considered practical for pulverizing equipment was about 400 F. Then came the Bowl Mill and with it new standards of mill drying. A recent service report reads, "On this installation, using Illinois coal with 15 per cent moisture, the mill is supplied with air at 600 F — no tempering." An unusual case — but the Bowl Mill was designed for this kind of service. Adequate mill drying depends upon proper agitation and aeration, and the method of circulation employed in the Bowl Mill performs that function perfectly.

The C-E Raymond Bowl Mill has demonstrated in service not only that it possesses the special advantages listed in the panel above, but also that it is a remarkably dependable, efficient and economical pulverizer. Before you buy, investigate the advantages of the Bowl Mill—visit an installation—get the facts first-hand from the men who operate the equipment. A new catalog is available—write for a copy.

A-439

Combustion Engineering Company, Inc., 200 Madison Ave., New York • Canada: Combustion Engineering Corp Ltd., Montreal

COMBUSTION ENGINEERING

on Dog-Eared Machine Accounting Forms

Watch out for dog-eared forms. They are a sure sign of poor paper. And poor paper means smudgy, illegible typing; sloppy erasures; sagging, crumpled, hard-to-file forms and sticky, drooping index cards.

You can end these faults — and the mistakes and inefficiency that go with them — by making Weston's Machine Posting Ledger and Weston's Machine Posting Index your standards for all machine accounting forms and index cards.

WESTON'S MACHINE POSTING *Ledger*

Made especially for machine bookkeeping in Buff, White, Blue and Pink in subs. 24, 28, 32 and 36. Has 50% rag content for strength and durability and a perfect surface for smudge-proof typing, easy filing, clean erasing; and a one-way grain direction that makes forms stand straight in trays or binders. Moderately priced.

WESTON'S MACHINE POSTING *Index*

Made in Buff, White, Blue, Ecru, Salmon and Pink in subs. 43, 53, 67 and 82. Has a ledger finish that takes typing clearly; will not smudge and can be erased repeatedly. Extra strength and snap make index tabs stand up without bending or tearing. WINCHESTER INDEX comes in the same weights and colors at the same price.

Write Byron Weston Co., Dept C., Dalton, Mass., for sample books showing all weights and colors of both index and ledger grades, and for Weston's Papers, *an interesting publication packed with ideas and information about paper.*

WESTON'S PAPERS

Give Goodwill a Lift..

AND HELP YOUR OWN MAINTENANCE COSTS, TOO

Housewives agree that outdoor metering has many advantages. But, "What are you going to stick on the outside of my house?" has blocked many a well-intentioned program.

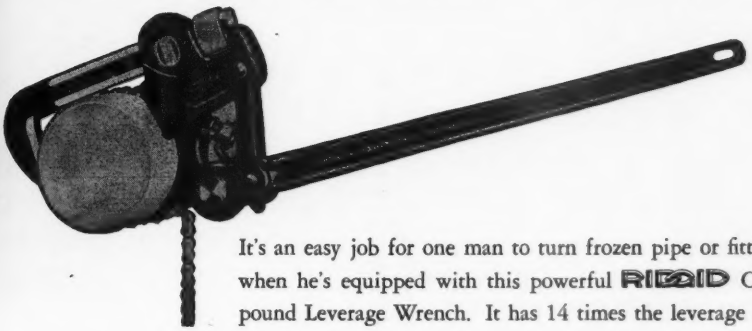
Make certain that your customers will have no regrets by mounting meters in Alcoa Aluminum meter cases. There's no rusting to hasten depreciation and cause installations to become unsightly. They never need painting. The natural Aluminum color is a neutral gray, blending perfectly with surroundings.

Aluminum meter cases have been adopted by many utilities. Die-cast or formed from Aluminum sheet, they are made to meet each company's exact requirements. In die-cast cases, lugs, fittings and bosses are cast integrally, with great accuracy of dimensions. Markings and instructions are reproduced in fine detail.

Send us your inquiries covering meter case requirements. ALUMINUM COMPANY OF AMERICA, 2134 Gulf Building, Pittsburgh, Pennsylvania.

ALCOA ALUMINUM

This 14-man-power RIDGID pays for itself on your first tear-down job



It's an easy job for one man to turn frozen pipe or fittings when he's equipped with this powerful RIDGID Compound Leverage Wrench. It has 14 times the leverage of a regular pipe wrench of equal jaw capacity—up to 3″. It's a time and payroll saver; no pulling extra men off jobs to help start a tight joint; no unsalvageable fittings that have to be smashed off. It's a quick move to fasten the trunnion on pipe or fitting—whichever is *not* to move, to drop this compact wrench in place and pump the handle that's conveniently short for tight places.

Buy one and have your men try it on the next tough job. You'll see in short order why all types of industries have RIDGID Compound Wrenches handy for their men to use. It's a sure profitable tool investment for your company. Make it a point to call your Supply House today.

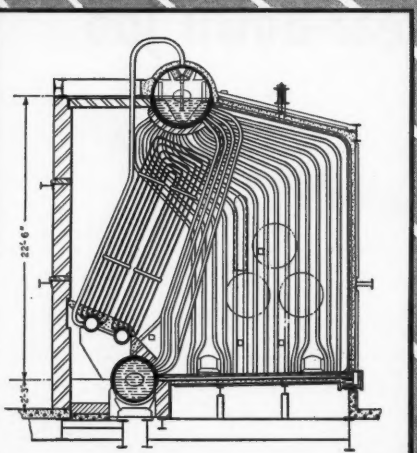
THE RIDGE TOOL COMPANY - ELYRIA, OHIO

MAKERS OF THE FAMOUS RIDGID WRENCH

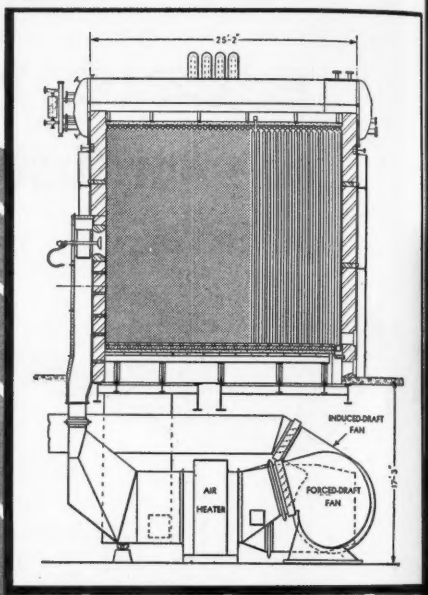
RIDGID PIPE TOOLS

Two B & W Integral Fu

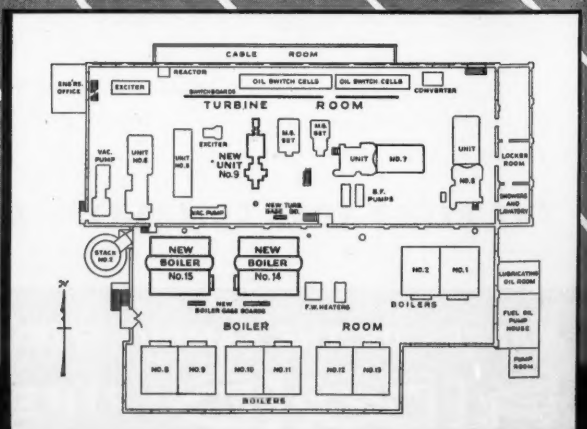
TRADE MARK REG. U.S. PAT. OFF.



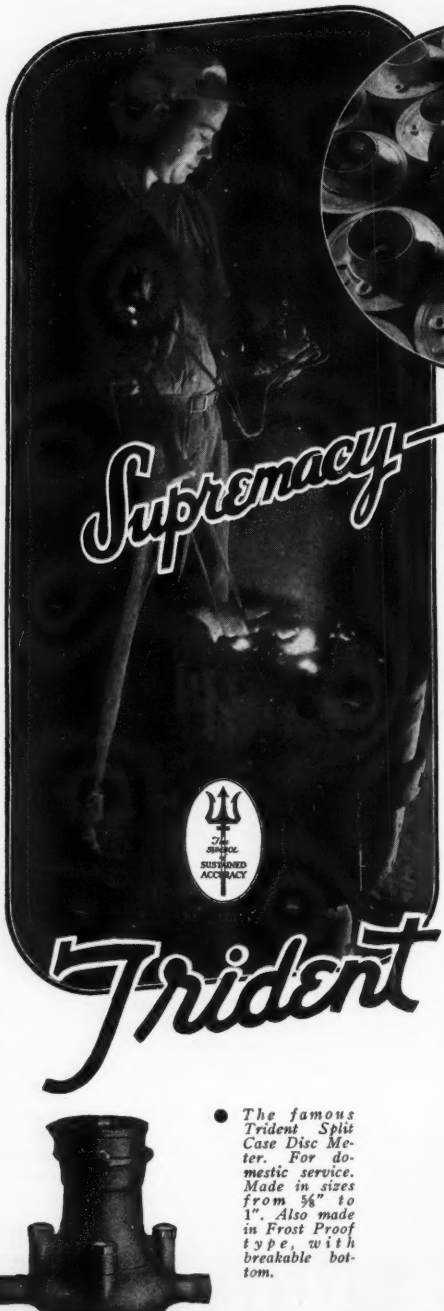
Sectional front elevation of the Integral-Furnace Boilers.

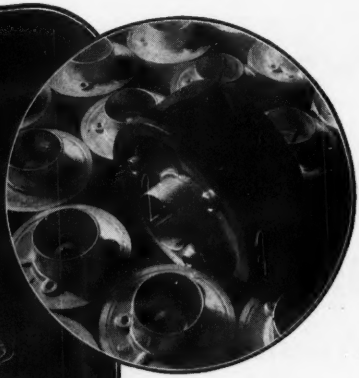


Sectional side elevation of one of the new Integral-Furnace Boilers.



General plan, West Jackson St. Station, Tampa Electric Co.





● *From the time the metal is poured to the finished meter, every step in Trident Meter production is under expert scientific supervision. Circular illustration shows Trident Disc Chambers . . . these can be furnished in metal mixtures suited to local corrosive waters or other factors.*

—in Quality

—in Service

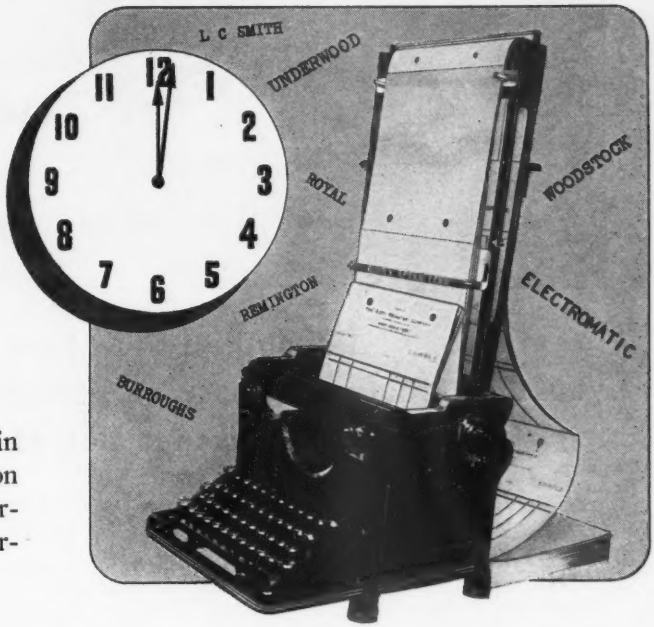
Trident Water Meters are products of precision manufacturing methods. They have established a world-wide reputation for simplicity, sustained accuracy and low maintenance cost over many years of use. Interchangeable parts protect against obsolescence, depreciation. Neptune Engineering Service is at the command of users, to solve all water meter problems . . . as, for instance, that of overcoming specific corrosive conditions with special mixtures of metals. There is a Trident Water Meter for every need. During the past 47 years over 5 million Tridents have been made and sold, the majority of which are still in use. Write for descriptive Catalog.

● *The famous Trident Split Case Disc Meter. For domestic service. Made in sizes from ⅝" to 1". Also made in Frost Proof type, with breakable bottom.*

NEPTUNE METER COMPANY
50 West 50th Street
(Rockefeller Center) New York City
Branch Offices in Principal Cities.
Neptune Meters, Ltd., 345 Sorauren Avenue, Toronto, Canada.

Converts any typewriter into a practical BILLING MACHINE

In One Minute



. . without change in pewriter construction r operation or interfer- g with its use for cor- espondence.

The Modern Way to Speed-Type all Forms

In writing multiple copy forms, sharp savings in time, labor and money are effected by the use of the Egry Speed-Feed. All the time of the operator is productive; output is increased 50% or more; costly one-time (pre-inserted) carbons, loose forms and carbons and other outdated methods are eliminated. Uses Egry continuous forms, with all copies held in perfect alignment. Up to 300 (and more) sets of forms can be written with a single set of carbons. No other device remotely approaches the Speed-Feed in ease of operation, in speed, in efficiency, in economy, and all this at a cost of less than 2¢ per day. Investigate the advantages the Egry Speed-Feed brings to your business.

EMONSTRATIONS

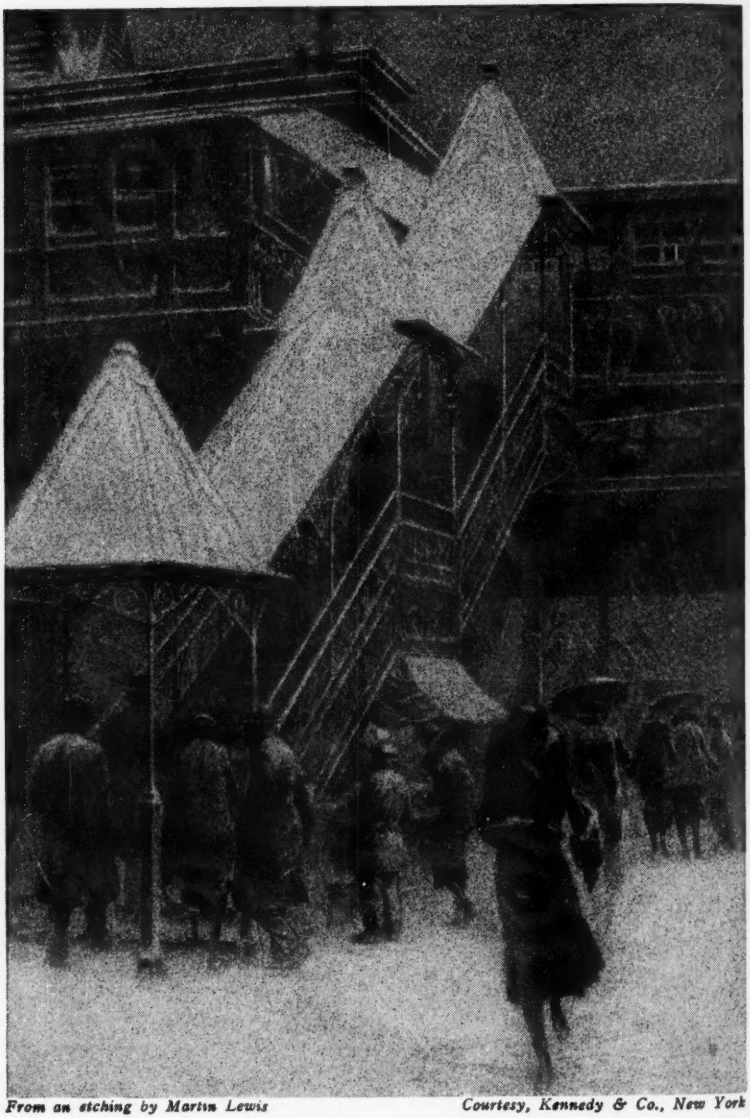
u may see the Egry Speed-Feed monstrated in your own office, thout cost or obligation. Consult classified telephone directory for dress of local Egry sales agent, write to Dayton for literature d information. Address Dept. 316

The EGRY REGISTER Company
Dayton, Ohio
SALES AGENCIES IN ALL PRINCIPAL CITIES

Utilities Almanack

MARCH

16	Th	¶ *National Railway Appliance Asso. ends meeting, Chicago, Ill., 1939.* ¶ *Northwest Electric Light & Power Asso. opens meeting, Portland, Ore., 1939.*
17	F	¶ *American Society of Civil Engineers, Mid-South Section, holds spring meeting, State College, Miss., 1939.*
18	Sa	¶ *American Water Works Association, N. Y. Sec., will convene, Rochester, N. Y., March 30, 31, 1939.*
19	S	¶ *Southern Gas Association begins annual convention, S. S. Rotterdam, New Orleans to Havana and return, 1939.*
20	M	¶ *Oklahoma Utilities Asso. starts convention, Tulsa, Okla., 1939.* ¶ *Sales Committee, E.E.I., convenes for session, Chicago, Ill., 1939.*
21	Tu	¶ *Connecticut Society of Civil Engineers, begins annual meeting, New Haven, Conn., 1939.*
22	W	¶ *Texas Telephone Association opens convention, Dallas, Texas, 1939.*
23	Th	¶ *National Rivers and Harbors Congress opens 34th session, Washington, D.C., 1939.*
24	F	¶ *Midwest Power Conference will be held, Chicago, Ill., April 5–7, 1939.*
25	Sa	¶ *Missouri Association of Public Utilities will hold meeting, Kansas City, Mo., April 12–14, 1939.*
26	S	¶ *The Maryland Utilities Association will hold spring meeting, Baltimore, Md., April 14, 1939.*
27	M	¶ *Oklahoma Telephone Asso. starts meeting, Oklahoma City, Okla., 1939.* ¶ *Asso. of Iron & Steel Engineers begins conference, Birmingham, Ala., 1939.*
28	Tu	¶ *Technical Section, American Gas Association, will hold Distribution Conference, Chicago, Ill., April 17–19, 1939.*
29	W	¶ *Pennsylvania Gas Association will convene for annual convention, Sky Top, Pa., May 2–4, 1939.*



From an etching by Martin Lewis *Courtesy, Kennedy & Co., New York*

Snow on the "L"

Public Utilities
FORTNIGHTLY

VOL. XXIII; No. 6 MARCH 16, 1939

Congress Eases Up on The Utilities

The utility industries, as such, have not one avowed champion in the halls of Congress, but they have fewer uncompromising enemies there. The author of this article, a veteran Washington correspondent, analyzes the scope and depth of this more moderate congressional attitude and the political reasons behind it.

BY HAROLD BRAYMAN

PUBLIC utilities generally probably have less to fear from the present Congress than they have had from any which has assembled since 1930.

There was a time starting back in the early thirties, and continuing until quite recently, when the cry of "power trust" in the Senate or House brought, like the whistle of Rhoderick Dhu, men scurrying from every corner.

That day is over. This does not mean that there will be no legislation passed which public utilities may regard as destructive to their interests, but it does mean that legislation of the punitive variety, designed largely for political purposes, is not in the cards.

"THE power issue" is no longer the magic political cry that it once was, except in a few sections of the country where local conditions still make it effective. The 1938 elections demonstrated this beyond question. The group of aggressive antiutility leaders in the House of Representatives was not decimated in the election; it was cut in half. Of fifty-four Representatives in the last Congress who were rated in this classification, twenty-nine did not come back.

It was not by any means the utility issue alone that beat them, but it was a contributing factor. In general these twenty-nine were ardent New Dealers who were away out in front in their advocacy of radical and experimental schemes, and it was they who felt most strongly the brunt of an expression of the will of the people for a slower and more orthodox approach to the high Roosevelt objectives.

In the Senate the result was less sensational because only a third of the Senators come up for election each two years, but the same tendency was plain. In general it was radicals who lost, conservatives who won.

So, not only has the actual voting power of the antiutility crusaders been reduced with a radicalism sufficiently complete that it should even satisfy themselves, but the effect has been plainly one of toning down the ardor of their colleagues who got by the 1938 hurdle. There is no one so skittish as a politician about skating too close to the spot where he has just seen a colleague disappear through the ice.

The situation is perhaps most graphically illustrated by the fact that Senator George W. Norris has not even taken the trouble to introduce in this Congress his bill, supported by President Roosevelt, to create throughout the country the so-called "seven sisters of the TVA." He was unable to get action on the bill last year and he knows passage of it this year is hopeless. The Roosevelt administration has likewise apparently abandoned this idea.

A new technique has been developed. In place of the old frontal attack on public utilities in general, accompanied by loud beating of the tom-toms against such characters as Samuel Insull, there is now an oblique offensive.

Most of the old antiutility program has been carried through. The TVA is a thriving concern. The "death sentence" against utility holding companies is in the process of being applied.

Generally speaking, utility rates have been reduced until now, over the country as a whole, they are lower than they have ever been before. And it is not the problem of the utility baiter that they might be still lower if once public confidence in utilities as an investment reached the point where sound companies could refinance their bonded indebtedness at present low interest rates.

The main attack has ceased to be directly on rates, financial organization, and policies. Since the advent of the TVA the main attack is through government competition with privately owned utilities.

No longer do many political orators declaim against the "power trust." Now in the name of flood control or navigation improvement they advocate a big new dam for their districts to be built at government expense. All the emphasis is almost invariably placed on the praiseworthy flood control or navigation features. Only incidentally is the power development involved. Yet, when the dam is built, the power is for sale and some public utility company sooner or later finds that it must purchase this power at a price fixed by the government, sell it at another price fixed by contract, or be threatened with the government construction of a competing system.

So the new technique used in many cases in the honest advocacy of valuable flood control and navigation improvement projects has also been seized upon by many of the old political opponents of the utilities to advocate in this guise projects which were really power developments emerging from the Trojan horse of flood control.

This is a much more difficult form of attack for honest public utilities to meet. They do not wish to be put before the public as opponents of legitimate flood control projects. They do not wish to oppose proper and necessary navigation development. But they do oppose the advocacy of dams for flood control when those dams are so remote that they cannot possibly affect the height of flood waters in the flood areas more than a few inches.

For example, the Watts Bar dam in the Tennessee valley was advocated as a flood control project for the Mississippi-Ohio region around Cairo, Ill. In the Senate debate Adams of Colorado pointed out that the storage of the dam would be 340,000 acre-feet at its maximum, and that this was between four and five hundred miles above Cairo.

"I will give an illustration from the Arkansas river, with which I am familiar," said Adams. "There was a flood in my community in which something over 100,000 second feet of water were passing. Wichita is perhaps the same distance below us that Cairo is below Watts Bar. When the flood reached there, there were only about 7,500 second feet, on account of friction and retardation. So the storage at that high point does not have a substantial effect."

That this oblique attack is much the shrewder and more subtle method of operation against the private utilities is plainly evident from the effect which it had on the vote of a Republican who is not notably against the utilities in the vote in the appropriations committee on the Watts Bar dam. Senator Holman of Oregon was planning to vote against the appropriation to begin work on this new dam. He had given his proxy to Hale of Maine. But he also wanted to get some flood control dams in his state and before the vote took place it was delicately suggested to him that if he wanted to get projects in his state he had better not vote against the other fellow's projects in some other state. So he changed his position, voted for the Watts Bar dam, and the final vote in the committee, instead of being 12-12 against restoring this appropriation, was 13-11 for restoring it.

But regardless of technique and

¶ *". . . not only has the actual voting power of the antiutility crusaders been reduced with a radicalism sufficiently complete that it should even satisfy themselves, but the effect has been plainly one of toning down the ardor of their colleagues who got by the 1938 hurdle. There is no one so skittish as a politician about skating too close to the spot where he has just seen a colleague disappear through the ice."*

without respect to the natural desires of any Congressman to get public works in almost any form for his district, the number of violent opponents of the private utility industry who are in the Seventy-sixth Congress is comparatively small.

Many of the outstanding crusaders were eliminated either in the primaries or in November. Outstanding among these were practically the entire Progressive delegation from Wisconsin and the entire Farmer-Labor delegation from Minnesota with one exception.

THE Progressives, Thomas R. Amlie, Gerald J. Boileau, Harry Sauthoff, George J. Schneider, and Gardner R. Withrow, were all succeeded by Republicans. The new group that replaced the Progressives are all moderate in their viewpoints. There is none of them who wants unjustifiable rates or unsound financial practices. They believe in regulation of utilities but they want that regulation to be by home machinery rather than by the Federal government. As a group they are sane and hard-headed, but there is not a crusader among them.

Of the two Wisconsin Progressives who were reëlected, Bernard J. Gehrmann and Merlin Hull, the latter at least does not go so far as to advocate public ownership.

Practically the same thing happened in Minnesota. There Farmer-Laborites John T. Bernard, Dewey W. Johnson, Paul J. Kvale, and Henry G. Teigan were all succeeded by Republicans. Only R. T. Buckler survived among the Farmer-Laborites. The Minnesota Republicans who came in like those from Wisconsin are fairly cautious and responsible men. The one showing the most signs of opposition to the utilities is John G. Alexander of Minneapolis.

Maury Maverick and W. D. McFarlane of Texas and Jerry J. O'Connell of Montana, all noteworthy for their belief that every corporation connected with the light and power industry was a sink of iniquity, were defeated. Conservative Democrats succeeded the Texans and a leading surgeon of Butte succeeded O'Connell, who with Bernard of Minnesota used to be known as the "Representatives from Spain."

AMONG the other antiutility Congressmen, Otha D. Wearin of Iowa struck for the Senate, and striking found his doom, as did also David J. Lewis of Maryland. These two went down in service to President Roosevelt and will undoubtedly be rewarded with appointive positions before the present Congress ends.

Others in the House "power bloc" who were succeeded by more conservative men include Bigelow and McSweeney of Ohio; McGroarty, Scott, and Dockweiler of California; Binderup of Nebraska; Citron and Kopplemann of Connecticut; Eckert and Gildea of Pennsylvania; Eicher of Iowa; Gray of Indiana; Hildebrandt of South Dakota; and Transue of Michigan. Nan Honeyman, a liberal Democrat of Oregon, was succeeded by a moderate Republican, Homer D. Angell; and George G. Sadowski of Michigan was succeeded by the unpredictable Rudolph G. Tenerowicz.

On the other hand, there were a few gains for the crusading antiutility

Antipower Group Casualties

"'THE power issue' is no longer the magic political cry that it once was, except in a few sections of the country where local conditions still make it effective. The 1938 elections demonstrated this beyond question. The group of aggressive antiutility leaders in the House of Representatives was not decimated in the election; it was cut in half. Of fifty-four Representatives in the last Congress who were rated in this classification twenty-nine did not come back."

bloc. Most notable of these were two New York districts, the one in which a 100 per cent Roosevelt man, James H. Fay, defeated the 1938 chairman of the Rules Committee, John J. O'Connor, and the other in which the American Labor Party man, Vito Marcantonio, regained his seat from James J. Lanzetta.

Routine turnovers in the Democratic ranks in Arkansas also sent new power bloc recruits from districts previously represented by conservatives. In the third district Clyde T. Ellis defeated conservative Claude A. Fuller by the narrow margin of 111 votes. A week after Congress opened he introduced a bill to create a Federal hydroelectric and flood control project on the White river in Arkansas. The text of his bill was virtually the same as the TVA bill with only the names changed.

THE utility industry also is faced with the proposition of having the entire Tennessee delegation permanently against it, even including Republican J. Will Taylor, who is one of the chief champions of the TVA. This has been a gradual development of the last three or four years and there are several factors involved in it.

Foremost of these is the fact that the TVA is highly popular in Tennessee and therefore no politician in the state dares to raise his voice against it. Naturally Tennessee has been benefited economically by the huge government expenditures which have been made there by the TVA. That much building is bound to create work and business in any locality where it is done.

By furnishing electricity at the lowest possible rates with the benefit of direct and indirect government subsidy, Tennessee hopes to benefit also by the attraction there of new industry, lured by cheap power costs.

But the most important factor in popularizing the TVA in Tennessee has been the determination of that organization to see that electric power was made available to practically everybody, no matter how humble or remote might be his habitation.

Many private power companies have made the political error of not en-

couraging farmers and others living in sparsely settled areas to put in electric power. They have in many cases held costs for the installation of new lines and new service at a rate which may have been justified on the basis of making extensions pay their own way, but which were in fact so high as to be prohibitive.

THE TVA, on the other hand, has taken the long view. It has pushed power out to the people and made it available on a basis of long-time amortization of costs. People who never before had electricity are now using it for lighting, heating, and cooking. They have bought all kinds of electrical gadgets and the little business men in the villages (aided by the Electric Home and Farm Authority, a Federal financing agency) have sold them washing machines, vacuum cleaners, milking machines, electric motors, and what not.

All this has been done at a cost or on financial terms which were within their reach, and their standards of life have been improved in a way which they cannot fail to see. Consequently they are for the TVA and they compel their politicians to be for it too. That loyalty to the TVA requires the Tennessee Congressmen to support all other government power projects.

There is a further political factor involved in the Tennessee delegation. That is the extension of the power of Boss Crump, the Democratic king of Memphis.

Mr. Crump is ardently antiutility. Back in the days when he was mayor of Memphis charges were brought against him for refusal to enforce the prohibition law. He has always believed that the local utilities had a hand in this, that the nonenforcement of prohibition was only a pretext, and that the real reason was his opposition to private public utilities.

Now Crump is in the saddle and woe to any politician over whom he has power who even suggests anything less than the deepest hatred for any private public utilities.

AND SO, with a solid Tennessee delegation, a few new recruits elsewhere, and the two dozen holdover members of Congress from the old antiutility bloc who were not defeated, there is still in the House a sizable nucleus of opposition to private utilities.

Of the holdover group by the far most vitriolic is Representative John E. Rankin of Mississippi. He has fervent help, however, from Patrick, Sparkman, and Starnes of Alabama; Voorhis and Welch of California; Keller and Sabath of Illinois; Cannon and Zimmerman of Missouri; Burdick and Lemke of North Dakota; Crosser and Sweeney of Ohio; Coffee, Hill, Leavy, and Magnuson of Washington; Gehrmann and Hull of Wisconsin; Chapman of Kentucky; Buckler of Minnesota; Fitzpatrick of New York; and Pierce of Oregon.

In the Senate the antiutility group was likewise weakened in the 1938 elections, but the results were less marked than in the House as only a third of the Senate is elected in each congressional election.

The first test of utility sentiment came on the Adams motion to strike out the appropriation in the independent offices bill for the Watts Bar dam. On this vote seven of the thirteen

new Senators who were sworn in in January voted to eliminate the appropriation and six voted to restore it. Those who sought to halt further public expenditures for dam building in the Tennessee valley were Danaher of Connecticut, Reed of Kansas, Tobey of New Hampshire, Barbour of New Jersey, Taft of Ohio, Gurney of South Dakota, and Wiley of Wisconsin.

THOSE who voted for the appropriation were Downey of California, Clark of Idaho, Lucas of Illinois, Mead of New York, Holman of Oregon, and Stewart of Tennessee. Of this latter group, Downey, Mead, and Stewart are definitely antiutility. The remaining three, Clark, Lucas, and Holman, have very definite conservative tendencies. Lucas was interested in the flood control possibilities of the dam in its relationship to southern Illinois. That swung his vote. Clark wants hydroelectric development of the Snake river in Idaho, and Holman desires government projects in Oregon. The logrolling tendency of not voting against the other fellow's projects when you are seeking your own made them vote for the dam.

But, generally speaking, the new group of Senators are considerably more conservative than the men they replaced. Clark, Lucas, Reed, Tobey, Taft, Holman, Gurney, and Wiley are all substantially more conservative than Pope, Dieterich, McGill, Brown of New Hampshire, Bulkley, Reames, Hitchcock, and Duffy.

Sheridan Downey is obviously more antiutility than McAdoo was; Mead is plainly more antiutility than was Copeland. The rest represent just about a stand-off. Danaher is perhaps a little more conservative than was his predecessor, Lonergan, and the same is true with respect to Barbour and his predecessor, Milton. Stewart is fully as ardent an opponent of the utilities as was George L. Berry.

However, so far as any radical utility legislation is involved, the group of new Senators lines up about ten against it to three for it. That is by far the best break the utilities have had in any group of new Senators elected in the last ten years. It is the first time since 1928 that a majority has not been against the utilities.

THE best indication to the line-up in the Senate as a whole came in this same vote on the Watts Bar dam. Counting actual votes and officially announced pairs, thirty-five Senators voted against the appropriation for this project and fifty-three voted for it. On the surface that seems like a fairly substantial majority. But still a change

¶ "THE *TVA* . . . *has pushed power out to the people and made it available on a basis of long-time amortization of costs. People who never before had electricity are now using it for lighting, heating, and cooking. They have bought all kinds of electrical gadgets and the little business men in the villages . . . have sold them washing machines, vacuum cleaners, milking machines, electric motors, and what not.*"

of 10 votes would have changed the result, and 10 votes are approximately only 10 per cent of the Senate.

It must also be considered that flood control, which practically everybody favors, was a factor in this roll call. The 2-day debate indicated clearly that several Senators, like Lucas, were impressed by the flood control feature of the appropriation, and regarded the issue of government competition with private power companies as secondary. It also indicated that several others voted for this dam on the theory that the broad program of the TVA, once embarked upon as a definite policy, should be carried through to its conclusion. Presumably these men would be unwilling to start any more such broad programs. In other words, it was for them simply a question of putting the finishing touches to a project, most of which is already completed.

Not only is the fringe list of anti-utility Senators decreasing, but the number and ardor of the crusaders is also declining. Heading this list of crusaders is Senator George W. Norris of Nebraska, who has been not only the most effective but probably the most sincere of the antiutility group. It has been he who has conceived and fathered the bills and resolutions; it has been he whose parliamentary skill has driven them through.

BUT Senator Norris is becoming less and less active, as age creeps up on him. He is now seventy-seven and does not have the physical stamina to fight with the old spirit. He has seen his dream of the TVA materialize and that has tended to reduce his enthusiasm for new battles. As things come up he will continue to fight, but he is not seeking as in the old days to find new things to bring up.

Borah likewise is getting less active, and, anyway, he was always a follower rather than a leader on the power issue. Wheeler is noticeably calming down. La Follette has his hands full at the moment with his own political difficulties in Wisconsin. Hiram Johnson's chief interest has turned to foreign affairs. And most of the newer crusaders against the utilities have little personal following and are not particularly effective. In this group belong such men as Bone and Schwellenbach of Washington, Downey of California, Holt of West Virginia, Lundeen and Shipstead of Minnesota, McKellar and Stewart of Tennessee, and Russell of Georgia.

However, while the utilities face this year a less unfriendly Congress, there is a collateral disadvantage which has come to them as a result of the defeat of comparatively large numbers of ardent New Dealers. For months preceding the election, President Roosevelt saved up vacancies in the executive departments and agencies to be filled after the election by those who fell in what he regarded as a good cause.

THE first of such appointments to be made was that of former Senator Pope of Idaho to the board of directors of the TVA. While Pope had been a 100 per cent New Dealer, as a director of the TVA he has proved to be moderate and conservative in his viewpoints in comparison with Lilienthal and Harcourt Morgan. He has been credited with helping to bring about the modification of the govern-

Antiutility Program

"IN place of the old frontal attack on public utilities in general, accompanied by loud beating of the tom-toms against such characters as Samuel Insull, there is now an oblique offensive. Most of the old antiutility program has been carried through. The TVA is a thriving concern. The 'death sentence' against utility holding companies is in the process of being applied. . . . utility rates have been reduced until now . . . they are lower than they have ever been before."

ment attitude which enabled an agreement to be reached between the TVA and the Commonwealth & Southern system. While Pope could hardly be counted a friend of the utilities, he may well turn out to be less unfriendly than the other members of the board.

Another similar appointment, although in this case the appointee was not a lame duck but retired voluntarily from Congress, was that of former Representative Edward C. Eicher of Iowa to the Securities and Exchange Commission. Mr. Eicher has long been regarded by the utilities as one of their congressional foes.

Former Representative Alfred F. Beiter of New York, another pronounced New Dealer, has likewise been given a job in the PWA, which makes grants for municipal power projects. The appointment of Associate Justice Felix Frankfurter must also be regarded as one which cannot add to the confidence of utilities when they have litigation going up to the Supreme Court. However much Mr. Frankfurter has always been regarded as an advanced liberal, he is also generally characterized as a judge who will put justice and the law far ahead of any personal viewpoints he may have. Most of the utility court battles have been fought and lost, however; only the possible establishment of a "prudent investment" rate base rule remains a conspicuous issue.

BUT the most annoying, to the public utility field, of all recent appointments was that of the lame duck, Thomas R. Amlie, an avowed advocate of public ownership for all utilities, to the Interstate Commerce Commission. As this was written, it appeared very doubtful that Mr. Amlie would be confirmed. His appointment has caused wide resentment in Con-

gress and even some of the moderate New Dealers may be expected to vote against confirmation.

President Roosevelt has indicated clearly that he plans to fight the thing through, and the nomination will not be withdrawn. His determination on this nomination seems to indicate that he intends to go ahead with the naming of economic radicals to important administrative positions. Very likely such other lame ducks as David J. Lewis of Maryland, Otha D. Wearin of Iowa, former Senator Fred H. Brown of New Hampshire, and F. Ryan Duffy of Wisconsin will also be given administrative posts. Confirmation of such New Dealers as these would be given without much question.

Nevertheless, radicals in important administrative posts can often do far more damage than they are able to in Congress, and it is, therefore, under the 1939 set-up, principally from administrative agencies that public utilities have to expect their major worries to come.

IN the legislative field there is comparatively little to cause concern. As has been previously noted, the Norris bill for the so-called "seven sisters of TVA" has been practically abandoned, at least for the time being.

Representative John E. Rankin has reintroduced his joint resolution directing the Federal Trade Commission to investigate private utility companies. This measure directs the commission to investigate all utility efforts to control or influence public opinion for the purpose of preventing the spread of public ownership. It also directs investigation of the extent to which utility corporations have coöperated to influence public opinion and of their actions to promote litigation against public projects. It further directs inquiry into the extent by which public ownership has increased since 1920, reasons for the growth, and "the economic and social advantages and disadvantages of such ownership."

This is a perennial resolution of Mr. Rankin's and it is not expected to get any farther this year than it did last year.

Representative Franck R. Havenner of San Francisco has pending before the House a bill to amend the Public Utility Holding Company Act by providing for the fixing of electrical rates on the basis of the prudent investment theory. The bill provides for rates to yield a "fair return" upon the prudent investment less accrued depreciation and the credit balance in other reserve accounts, plus a reasonable allowance for working capital. This bill represents the Roosevelt prudent investment theory, but there seems little likelihood that this Congress will be willing to push it through.

THE usual batch of TVA bills—a dozen or more of them—have been introduced, but they are mostly unimportant and inconsequential. The only really important one is the McKellar bill to extend the TVA to the Cumberland river. There appears little possibility that this Congress will extend the TVA beyond its existing program.

There is a group of flood control bills, many of which involve power development. The only one of consequence is that of Representative John A. Martin of Colorado authorizing flood control projects totaling $195,-

000,000 which have been approved by the Army Engineers, but not all of which are included in the budget.

In connection with flood control, Senator David I. Walsh of Massachusetts was, at the time this was written, acting as unofficial mediator between the Roosevelt administration and the four New England states that entered into the flood control compact. The administration is insisting upon complete control of the water power involved. Since the cost of the development would be borne by the Federal government, the New England states, which are insisting upon state control of the power, are in a politically untenable position. The government has the whip hand because it proposes to give the states something for nothing and New England, ravaged by floods in recent years, will not make it politically pleasant for governors who refuse the gift.

The outcome is confidently expected to be a surrender by the states, after which the question will go to Congress for airing when Congress is asked to authorize the development of power as a by-product. The states will probably fight this bill in Congress.

WHAT may come before Congress as a result of the study being made by President Roosevelt's special committee on the shortage of power from the viewpoint of national defense cannot be predicted now since the committee has not completed its work. Some utilities are fearful that national defense may be used as a cloak to put over more public development projects.

Nor can it be foreseen what, if any, legislation may be recommended by the TVA investigating committee headed by Senator Vic Donahey. This committee is due to report about April 1st.

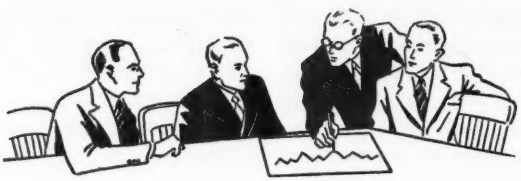
Always hanging in the background of Congress is the St. Lawrence waterway treaty, which involves extensive international power development. Negotiations are still being carried on by President Roosevelt with Canada. If the deadlock at Ottawa between Premier Mackenzie King and the Hepburn government of Ontario can be broken, there is a possibility that a St. Lawrence treaty may come before the Senate for ratification.

It is unlikely to happen during this session of Congress and if the treaty is again proposed the opposition to it in the Senate will be stronger than ever.

Two or three years ago most of the Senators from the Middle West were for the treaty. Then they thought development of the St. Lawrence would provide cheap transportation of wheat and other agricultural products to world markets. Now since reciprocal trade treaties have been negotiated in considerable numbers, the Middle West is afraid a cheaper water route through the St. Lawrence would only bring a flood of foreign agricultural products to compete with the American ones.

WHETHER that reasoning is sound or unsound is immaterial here; the fact is it has brought a more critical approach to the St. Lawrence waterway question on the part of several Mid-Western Senators.

And so, with no important threats of immediate unfriendly legislation and with a Congress substantially more conservative than any since that elected in 1928, the prospect for the utility industry to emerge upon a plateau of relative political calm seems reasonably assured.



Regulation of Utilities or Public Ownership?

The American people should decide and decide soon, in the opinion of the author, whether they prefer the private rendering of electric service under effective public control, or the government ownership and operation of our electric utilities.

By ERNEST R. ABRAMS

A LITTLE more than fifty-six years ago, on a September afternoon in 1882, Thomas A. Edison placed a tiny electric generating plant in operation in New York city, and made available to a handful of near-by stores and office buildings the first practical central station electric service in the world. And from this crude generating station, with its capacity for supplying current to 3,600 16-candle-power incandescent bulbs, has grown our present electric power and light industry, with its capacity for lighting more than a billion and a half lamps of comparable brilliance.

During most of these fifty-six years, we have been experimenting with one device or another in an endeavor to secure the best possible electric service at the lowest actual cost. We have tested unrestricted competition and uncontrolled monopoly. We have tried public ownership and regulated private operation. We have been served by individual private companies and by the operating units of far-flung holding systems. And, apparently, we had settled on publicly regulated, privately rendered, monopolistic service as the best solution to our electric service problems, when our accepted arrangement was abruptly upset by the adoption of a new power policy by the Federal government. Now, we must reweigh the merits of public *vs.* private electric utility ownership, and again choose that arrangement which promises the most efficient and economical service.

IN the early years of the electric utility industry, when it was doing essentially a lighting business, the creation and development of an electric service system involved great financial risk, strange as that may seem today, and private capital alone was compelled to accept that risk. But as soon as electricity had demonstrated its ad-

vantages in comfort, convenience, efficiency, and cost over other alternatives or substitutes, public ownership of electric utilities made its appearance.

In many respects, this public entry into the field of electric service was necessary, if all the communities entitled to electricity were to enjoy it. For private enterprise was experiencing considerable difficulty in engaging the enormous amounts of capital required to meet all of the demands for electric service systems that were arising throughout the country, despite its appeals to foreign capital and its solicitation of even small investors at home. But most American communities of any age or size had already established their credit, at home and abroad, and the sums required for the creation of electric service systems were often more readily forthcoming, and at substantially lower cost, in exchange for their pledges than for the bonds and shares of private promotions. It is not surprising, then, that publicly owned electric systems should spring up in most sections of the country with such rapidity that, by 1902, close to 10 per cent of all the electric generating capacity in the United States was contained in publicly owned plants.

DURING the next three decades, however, a growing realization by investors of the fundamental soundness of private electric utilities, plus the complexity of technologic problems created by the ever-expanding demand for electricity, tended to discourage further public participation in the electric utility field, and even to convert many of the existing public systems into private operations. Indeed, of the 3,938 public plants which had been established during the half-century ended with 1932, only 1,870 public systems, serving less than 5 per cent of all the electric consumers of the country, remained in operation at the close of this period.

But this trend toward a lessening public participation in the electric service field has been sharply reversed since 1932. In an attempt to combat the ravages of the business depression through the stimulation of employment on the one hand, and to further the acceptance of its own concept of electric utility ownership and regulation on the other, the present administration has not only created huge public power projects in regions already well supplied with generation facilities, but, through Public Works Administration grants and loans, it has encouraged communities in the acquisition of existing private facilities, or in the construction of electric systems with which to compete with them. The product of these policies over nearly six years has been the establishment of approximately one hundred and forty public power projects, now in operation or in some stage of construction, which have been financed, either wholly or in part, with public funds. And these projects, when completed, will increase the total installed electric generating capacity of the nation by more than one-fifth, or by approximately seven million kilowatts.

SURPRISINGLY, Thomas Edison's Pearl street generating station was not the first electric generating plant in New York city, nor were the first crude lamps which lighted stores and offices along its Fulton street in 1882 the first electric lights in the metropolis. Two

years earlier, four private electric systems with small generating plants were doing a thriving business in furnishing electric arc-lighting for streets and buildings in the lower reaches of Manhattan. For it was not the creation of machinery for the production of electric energy but the invention of a practical incandescent lamp in which to utilize electricity that was responsible for such widespread demand for electric service, and which gave so mighty an impulse to the electric utility industry. But the pertinent point in this brief review of the early years of electric service is that competition between private systems existed even before the seed of the practical industry had sprouted.

This competitive condition was wholly natural in a growing country of enormous dimensions and great natural resources, where all were fired with the dream of equal opportunity, and where restrictions on unlimited participation in all fields of economic activity were exceedingly unpopular. In fact, the electric utility industry had its inception during an era of violent protest against monopoly in any form, which was productive, eight years later, of the first Federal antimonopoly statute. And because of this public attitude toward all forms of monopoly in the early 1880's, competition between private electric systems, or between public and private systems, became the rule in many communities. Since, however, the demand for service in most communities was insufficient to support duplicate sets of facilities, competition usually resulted in the bankruptcy of either or both undertakings, or in their merging into a single operating unit, or in a division of the service area between them. At any rate, the major objective toward the attainment of which the competitive condition was instituted—the permanent reduction of the price of electricity—was largely defeated.

ONE of the few remaining instances of active competition in the field of electric service today is in Seattle, where that municipality and a private utility, each, operate a city-wide system which alone is capable of meeting the entire electric needs of the community. And the duplication of costs arising from the operation of these competing systems, a total of more than three million dollars annually, represents "a complete waste that is paid only by the people in their light bills," according to the 1937 annual report of the Seattle Department of Lighting.

Yet another underlying reason for

¶ "IN *the early years of the electric utility industry, when it was doing essentially a lighting business, the creation and development of an electric service system involved great financial risk, strange as that may seem today, and private capital alone was compelled to accept that risk. But as soon as electricity had demonstrated its advantages in comfort, convenience, efficiency, and cost over other alternatives or substitutes, public ownership of electric utilities made its appearance.*"

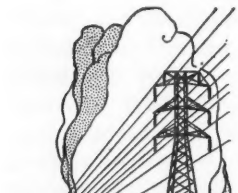
the public encouragement of competition in the electric service field was the utter lack of appreciation, half a century ago, of the economics of electric utilities. For not only did the growing demand for electric service of that period require a constantly increasing supply of new capital for the expansion of facilities, but technologic developments in the new art made existing equipment obsolete before even a fraction of its physical life had been exhausted. And the combined effect of these two influences was to require an investment in electric utility facilities that was eight times greater for each dollar of gross revenues produced than was needed in the field of general industry. It is not surprising, then, that competition between private utilities, or between public and private systems, had practically disappeared from the electric service field by the early years of the present decade.

BUT the unrestricted and noncompetitive operation of privately owned electric utilities failed to prove any more satisfactory to the consuming public in the quality of service rendered, or in the price of that service, since far too many utility promoters and operators regarded the monopolistic production and sale of electricity as a golden opportunity to charge all the traffic would bear for the poorest quality of service the public would accept. Obviously, any public service which was dominated by so unsocial an attitude was certain to arouse public resentment, and to generate a demand for effective public control. And, therefore, during the first decade of the present century, public regulation by commissions of monopolistically rendered private electric service became the accepted arrangement in the United States.

This public regulation of private electric utilities was directed, during the quarter of a century that ended with 1932, at a wide variety of activities that had theretofore been considered as purely the prerogatives of private management. Rates, service contracts, quality of service, accounting methods, expansion of facilities, and issuance of securities — all these and many more matters for managerial decision became subjects of commission jurisdiction. But during recent years, on the apparent assumption that the ability of any utility management to operate successfully is prima facie evidence of the unreasonableness of existing rates, the present administration has been attempting to regulate the profits of private electric utilities. And the device often employed to force the drastic reduction of rates, and thus of profits, has been the threat, or the actual construction, of publicly owned competitive systems.

THIS encouragement through loans and grants of punitive public plants has been defended by administration public ownership advocates as the one effective device for the control of private utility rates, and they have pointed to the sharp decline in residential charges that have resulted from the construction, or the mere threat of construction, of public competitive systems in specific communities. Certainly, no one familiar with the history of the electric utility industry will deny that exasperating conditions have existed in far too many communities where the use of this curb to greed or

Electric Competition in Seattle



"ONE of the few remaining instances of active competition in the field of electric service today is in Seattle, where that municipality and a private utility, each, operate a city-wide system which alone is capable of meeting the entire electric needs of the community. And the duplication of the costs arising from the operation of these competing systems . . . represents 'a complete waste that is paid only by the people in their light bills' . . ."

stupidity may have been justified. Possibly, similar conditions exist in isolated communities today. But on the whole, the record of privately owned utilities in the electric service field has been one of great public service, and of outstanding performance.

In 1907, when the modern era public regulation by strong commissions was instituted, our electric utilities were serving 1,730,000 residential customers, or approximately one in each 38 American families; in 1932, the last full year before the present drive for public ownership began, they were serving nearly 20,000,000 household customers, or almost two in each three families; and in 1937, they served more than 22,120,000 families, or well over two in each three families in the country. In 1907, these residential customers used an average of 25 kilowatt hours of electricity each month; in 1932, their average monthly consumption was 50 kilowatt hours; and in 1937, they used an average of 66 kilowatt hours each month. In 1907, our electric utilities charged their residential customers an average of 10½ cents per kilowatt hour; in 1932, this average price was 5⅜ cents; and in 1937, the average charge had dropped to under 4⅜ cents per kilowatt hour. And where most sections of the country were served by isolated plants in 1907 and service interruptions were frequent, our principal electric service systems had been largely interconnected by 1932 and 1937 and power interruptions were rare.

CREDIT for this vast expansion in the residential use of electricity, for its steadily declining prices, and for the improved quality of its service, should not, however, be laid at the door of private management alone. All through these years, from 1907 on, public regulation of privately owned electric utilities by commissions was in effect in an increasing number of states, and the extent of the jurisdiction of these governmental bodies was being constantly broadened to cover almost every act of management. It would appear, then, that these regulatory commissions have contributed in no small way to this outstanding achievement in the field of public service, and, for that reason, it is difficult to justify the contentions of

public ownership protagonists that past attempts at regulation of privately owned electric utilities have resulted in failure, and that public competition with, or public ownership of, our electric utilities remains the only certain method of securing efficient electric service at the lowest actual cost.

For if the regulation of electric utilities by government officials over a quarter of a century has failed to secure and maintain the most efficient and economical electric service, as its critics allege, how much less effectively could electric utilities be operated through government officials?

Purely from the standpoint of the technical problems involved, no reason appears why either public or private operation of electric utilities should have any advantage, one over the other, in the United States. The fundamentals of the art of producing and distributing electricity are well established at present levels, and not only is competent engineering talent at hand for the construction of public power systems, but trained personnel is available to operate them just as efficiently as private electric systems. But the reason for the established superiority of private to public operation, in the benefits accruing to the consuming public under either arrangement, is immediately apparent when the extent of possible political interference with efficient operation is considered.

DURING the more than thirty years of commission regulation of private electric utilities, violent differences of opinion have arisen as to the merits of many of the orders handed down by public regulators, and recourse has often been had to the courts for relief from orders considered burdensome. But all through these years, commission regulation has been singularly free from attempts to interfere with the efficient operation of private electric utilities, and there has been no attempt to inject politics into the conduct of private utility affairs. On the other hand, politicians have refused to keep their hands off the operation of public electric systems, and business, engineering, and accounting standards have too often been sacrificed to political expediency.

This subjugation of efficiency to political convenience has been productive of several major differences in the fundamental accounting procedures of public and private electric utilities. Where private systems must set up a capital account, to which profits may be added but from which losses must be deducted, public systems have generally conducted their operations on a cash basis, with profits—if any—usually reinvested in the undertaking or squandered and with losses customarily spread on the tax rolls. Likewise, where private electric utilities are compelled accurately to record all revenues and expenses, and to report true operating results and actual financial condition to regulatory commissions, public systems, largely exempt from commission control, have generally employed such inadequate or confused accounting that the taxpayers find difficulty in ascertaining true operating costs or actual financial standing.

FURTHERMORE, in an endeavor to provide electric service at a lower cost than possible under private operation, politics has decreed that public systems be largely relieved from the

tax burden which weighs so heavily on private enterprise. During 1937, the privately owned electric utilities of the country contributed slightly more than 16 cents of every dollar of operating revenues to the support of Federal, state, and local governments while the combined tax bill of our publicly owned electric utilities was equivalent to but 1½ cents of each revenue dollar. Obviously, the net cost of electricity to the consumers of the nation, or of any portion thereof, is the difference between the gross amounts paid to their serving utilities, and the proportion of those payments which the utilities contribute to the support of governments.

Accordingly, if the people of the United States are to weigh intelligently the merits of public *v.* private rendering of electric service, if they are to reach any rational decision as to which arrangement will secure to them the most efficient electric service at the lowest net cost, not only must public systems include taxes at the same rates as those paid by private utilities in their operating costs, but they must also accurately debit all free or undercost services—rent, accounting, engineering, legal, etc.—which are furnished by other governmental departments, and all of which represent an expense to the taxpayers. Otherwise, there can be no true basis of comparison of the actual cost of electric service under the two arrangements.

DURING recent years, the need for full and complete disclosure of the costs of public undertakings has been greatly intensified by the construction of numerous public projects throughout the country where the production and transmission, if not the distribution, of electric power are but two of the many purposes for which they are being created. For unless allocations of the investment in these projects are fairly determined among the several purposes, and unless actual operating costs are accurately and fully recorded, the taxpayers of the nation may be compelled to carry unproductive and uneconomic "white elephants" through their tax contributions, long after these projects should have been abandoned.

The improvement of navigation on the Missouri river is typical of this "white elephant" class of projects. The first Federal appropriation for that undertaking was made in 1878 and, by June 30, 1936, some $247,000,000 had been spent on the project. From the time Pere Marquette first paddled his canoe on its waters until the 1936 mid-year, the Federal government had spent a little over $248,000,000 on the entire Great Lakes system—its harbors, chan-

¶ "WITH *four-fifths of our people now living in electric-lighted homes, and with practically all of our business and industrial institutions consumers of electric power today, an adequate and continuous supply of electricity is vital to our national well-being. And the continued adequacy of our electric service . . . is primarily dependent upon an adequate and continuous supply of new capital for the expansion of utility facilities.*"

nels, and connecting rivers. Yet the gross 1936 traffic at all Great Lakes ports was 101 times the tonnage carried on the Missouri river—and over 90 per cent of that Missouri river tonnage was comprised of government construction materials being hauled around to further improve navigation on the stream.

PRIVATE enterprise would have been forced to abandon so uneconomic an undertaking many years ago, but public enterprise continues to "invest" the contributions of its taxpayers in the creation of added facilities. And since the ultimate cost of both the TVA and the Grand Coulee projects promises to be double the investment to date in navigation improvement on the Missouri river, and as honest doubt now exists as to the justification for the huge investment of public funds in either of these projects, honest and complete accounting of original costs and operating expenses is demanded. Even the United States cannot afford to maintain "white elephants" indefinitely.

And, finally, the effect of the financing of publicly owned utility systems on the borrowing capacities of our municipalities and other political subdivisions is worthy of serious consideration. Practically all of our forty-eight states impose constitutional limitations on the amount of indebtedness their "children" may incur, in relation to the assessed value of the taxable property within their boundaries. And, obviously, debts contracted for utility ownerships effectively reduce the amount of borrowings available for other public purposes, for activities which probably fall more closely within the American concept of the proper fields of public undertaking than the production and distribution of electricity.

Just recently, New York city, having already incurred an enormous debt for transit purposes, and desirous of adding all privately owned elevated and subway lines to its municipal transit system, was forced to secure the consent of the voters of the entire state for the exclusion of its contemplated transit borrowings in the calculation of its total constitutional debt. Meanwhile, many desired improvements to its street and school systems must await a general rise in taxable property values.

WHATEVER may be our decision as to the arrangement most likely to produce the most efficient electric service at the lowest actual cost, that decision should be reached as early as possible. With four-fifths of our people now living in electric-lighted homes, and with practically all of our business and industrial institutions consumers of electric power today, an adequate and continuous supply of electricity is vital to our national well-being. And the continued adequacy of our electric service, approximately 95 per cent of which is now privately rendered, is primarily dependent upon an adequate and continuous supply of new capital for the expansion of utility facilities.

Unfortunately, our national power policies have created such uncertainty in the minds of investors that few private electric utilities today are able to engage new capital in exchange for their common shares, with the great majority being compelled to borrow their capital requirements. And this necessity of increasing their debt burdens without a corresponding increase

of their share capitalizations is fast forcing them into an unhealthy financial position which must ultimately be reflected in the quality of their service.

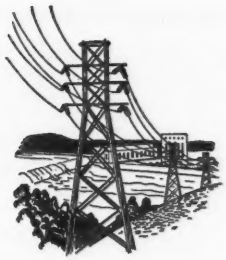
Our privately owned electric utilities have an estimated capitalization of some $13,800,000,000 today, of which about 49 per cent is represented by bonds, debentures, and other evidences of debt, and the balance by preferred and common stocks. And, today, current net income is sufficient to cover interest and other mandatory charges approximately 2¼ times. If, however, our private electric utilities must invest one billion dollars annually over the next decade, an amount substantially under the estimates of the Federal Power Commission, and if even three-quarters of that new capital must be borrowed, then more than 60 per cent of private electric utility capital will be represented by debt contracts by 1948, and less than 40 per cent by preferred and common shares. And if debt contracts represented 61 per cent of present-day electric utility capital instead of the existing 49 per cent, current net income would be sufficient to cover fixed charges only 1¾ times in place of the actual coverage of 2¼ times today. Obviously, under such a ratio of debt to total capitalization, the credit of our private electric utilities would be substantially weakened, and their ability to even borrow new capital greatly reduced.

ONE of the major conditions contributing to the plight of our railroads today is the top-heavy debt structure thrust upon them by an inability to sell capital shares, and our private electric utilities are now being forced to follow their depressing lead. For investment capital is timid at best, and while it may still be willing to accept the debt contracts of private electric utilities, it largely refuses to accept the risks inherent in their shares under threats of public competition.

For that reason, if for no other, the American people should decide, and decide soon, whether they prefer the private rendering of electric service under effective public control, or the public ownership and operation of our electric utilities.

"ADVOCATES of full development and use of our inland waterway system must be on guard to combat any effort to establish artificial water freight rates, not based on the actual cost of transportation, but fixed arbitrarily to conform to rates applying to other methods of transportation. Water transportation in most cases complements and supplements the railway and truck network. Full use of a coördinated inland waterway system will develop whole regions producing commodities dependent upon cheap transportation, and such general development in turn will increase the demand for transportation of those commodities which require rail and truck movement."

—MAJOR GENERAL JULIAN L. SCHLEY,
Chief of Engineers, U. S. Army.



Floods, Navigation, and Power

Three water problems requiring different methods for effective solution.

Water-power developments cannot, in the opinion of the author, be classified as the most effective flood or navigation control methods; and it is very difficult to determine, with a high degree of accuracy, he says, how much a given dam is worth as a flood control device, how much as an improvement to navigation, and how much for power development.

By J. E. BULLARD

EVERY flood reminds us that a large volume of uncontrolled water can do an immense amount of property damage and cause many deaths. When the citizens in a flooded area become as aroused as they did in Dayton, Ohio, after the last disastrous flood which visited that city, something effective is done about it. There is a thorough engineering survey by competent engineers and the necessary control construction is carried out.

Railroads, motor vehicles, and airplanes provide means of travel so much speedier and flexible than inland water routes that there has been a great falling off in the comparative tonnage of freight and passenger miles on the river steamboats. That, however, has not lessened, to a very marked degree, the interest in improving navigation facilities on our rivers. In time of war, when our transportation systems are overloaded, there is no doubt that being able to shift some of the burden to the boats plying the inland waters would help. So the program of improving inland navigation is never completed. Our rivers and harbors continue to absorb large sums of money every year.

PERHAPS nothing has done more to increase the wealth of this nation and to raise the standard of living than the steadily increasing use of power-driven machinery. Now, 12½ cubic feet of water a minute falling 50 feet can be used to produce a horsepower of power. It would seem, then, our prosperity would be still further increased if we developed our water-power resources to a greater degree than we ever have in the past. It would give us more and more power and every horsepower produced from water conserves the fuel which would otherwise be used for generating power.

There are three reasons, therefore,

why we should spend money developing our rivers. One is flood control, one improved navigation, the other producing power to conserve our fuel supplies and to add to the wealth of the nation. The simplest and most economical way would seem to be to combine all three in one great development.

The real difficulty which lies in the way is that the most effective means to each end is likely to be different. In some instances it might be a good deal like endeavoring to move a given load by hitching a horse, a tractor, and an airplane to it and have them all pull at the same time in different directions.

IN the case of flood control, the problem is to prevent too large a flow of water in the streams and rivers at any given time. A thorough engineering survey may show the best way to do that is to construct dams at the proper locations. These dams are built much in the shape of a bridge with the arch of such a size that no more water can flow through than will remain within the banks of the watercourse on the down-stream side.

When there is no more than a normal flow of water there is no flooding of the land on the up-stream side. If it is farm land, crops may be raised on it. When there is a freshet and more water is reaching the dam than can flow through, the surplus is backed up on the land and held back until it can flow through the dam at a normal rate.

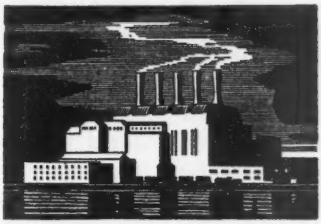
There is no impounding of water at any time except under flood conditions. This means that the minimum area is required for impounding during a flood. The dams act merely as automatic controls of the volume of water which flows down the stream.

Where the conditions are such that such a system of control dams as this will serve the purpose, effective control results and the cost of bringing about this control is low compared to the damage caused by uncontrolled flood waters.

THE navigation problem is one of providing channels which will always be deep enough and wide enough for the vessels which use the waterway. This may mean the impounding of flood waters by means of dams which hold back a sufficient amount to make it possible to raise the water level below the dam by the necessary amount during dry periods. Locks have to be constructed to permit the water craft to go around the dams. The problem therefore, primarily, is one of maintaining as uniform a water level the year round as it is practical to maintain. It must never be too high, nor must it ever be too low. Obviously, the flood control means, already mentioned, will not serve the purpose because the flood water would then soon flow away and there would be no impounded water to use when the dry weather lowered the level of the stream.

IMPROVING navigation requires a series of reservoirs and locks designed for navigation purposes. When the project is designed for navigation purposes only, the dams are not likely to be high enough or to be so placed as to produce the most power.

If the greatest possible amount of power is to be extracted from a given river, one dam must be built below the other right on down the river and the dams need to be high enough and close enough together so that the water from



Economy of Generating Power by Steam

"THE relative economy of generating power by water and by steam has long been controversial among power engineers. There are some who always have maintained, and still maintain, that unless the power site is one which can be developed at extremely low cost, the same amount of money invested in a steam plant or plants will show a much better return over the period of the life of the dam constructed."

one dam is backed up to the foot of the next dam above. Back of each dam the area which the water covers should be great enough to enable impounding a sufficient quantity to provide an even flow the year round to the water wheels. The dams need to be high enough to provide an efficient head of water.

This means high and costly dams. It means a series of reservoirs any one of which may hold enough water to cause a disastrous flood, should a dam give way, and dams which have been constructed according to the best engineering principles, or at least have been supposed to be, have been known to give way.

IN the case of the straight flood control system, there is no permanent storing of water. Only the surplus water is stored during flood conditions and as soon as that condition ceases to exist, the water flows down stream. All the emergency reservoirs are empty and ready to serve their function when there is another flood.

In the case of water-power developments, there are dams and always a considerable permanent storage of water. The only times the reservoirs are low are during long dry periods when not sufficient flow is available to meet the power requirements. At practically all times, should a dam give way, there would be a more or less disastrous flood below the dam. During flood conditions the dams are placed under more than normal strains and may give way then. As a matter of fact, there are not many bad floods during which at least some dams, possibly small ones, do not give way.

Because of such facts as these, water-power developments cannot be classed as the most effective flood control methods. It may happen that they prove just the reverse. Because the dams are

so high, the building of locks to enable river craft to get around the dams is expensive. Each vessel must be raised from the level below the dam to that back of it. The process is slow and may be expensive. The water used for raising these vessels, whether it is used in the form of water or of electric power generated by water, cannot be used for any other purpose.

To get the most power from the river, every drop of water that flows down the stream must pass through the water wheels at each dam. There must never be any water flowing over the dam and there must never be such low water that there is not a normal amount of power developed. Such developments as this, however, almost always are so costly as to be prohibitive.

WHEN private investors put their money into water-power developments, it is their money and they take the risk. This risk may prove to be far greater than they imagined. It may be years before they receive any returns on their investment. Unless the development becomes part of the system of a large holding company so that every horsepower hour of power which is generated can be sold, they may never receive anything like a satisfactory return on their investment.

The relative economy of generating power by water and by steam has long been controversial among power engineers. There are some who always have maintained and still maintain that, unless the power site is one which can be developed at extremely low cost, the same amount of money invested in a steam plant or plants will show a much better return over the period of the life of the dam constructed.

They point out that the cost of a steam plant per unit of capacity is far less than the cost of a water-power development per unit of capacity. They call attention to the fact that the fuel consumption, per unit of power produced, is now not more than a tenth of what it was back in 1880 and that economies continue to be effected. They do not overlook the additional investment which has to be made in transmission lines to bring the current generated by water power to a market where it can be sold. The steam plant, on the other hand, can be built at a location which reduces the length of the transmission lines to the minimum. Unless a great deal of money is spent in flood control in the watershed which feeds the river, where the power development is made, the power plant may be out of commission entirely during exceptional flood conditions; and to assure a continuous supply of electric current to the customers of the power house, it becomes necessary to build steam plants to take care of the load when the water-power plant is out of commission.

THOSE who take this side have no end of arguments to support their stand and they are supplied with an abundance of factual data to back up their arguments. Such engineers, naturally, are very much opposed to the government using the money of the taxpayers for power developments. They are opposed to it because they believe such developments are not sound financially and because they believe the government will sell the current generated at far less than its actual cost. It is very difficult, indeed, to determine with a high degree of accuracy, how

much a given dam is worth as a flood control device, how much as an improvement to navigation, and how much should be allocated to power development.

If, in ten, twenty-five, fifty, or even a hundred years from now that dam should give way, it might cause more property damage and more loss of life than the total value of the dam itself. The damage might be greater than would have been the case had no dam ever been built, especially if the same amount of money invested in it had been used for the most effective system of flood control.

There is no way of being absolutely certain that a dam never will give way.

THERE is no question that it is probably a government function to carry on flood control work. It may be a good thing for the nation to have the navigation of our rivers improved. The experience of private companies in developing water power still leaves some doubt in regard to whether it is economical to go very far in such developments. At least a great deal of engineering study should be given to each case and an exhaustive survey made of the possibilities of selling, at a profitable rate, the total power which is generated by the development.

Flood control is one thing; navigation is another. Water power in this country, where there is an ample supply of fuel in most sections, is likely to prove profitable, more often, when the electricity generated is fed into a large distribution system which is also supplied by a number of steam plants. In such a system the very best use may be made of the power possibilities of the development. This means that government development and operation of power plants is likely to lead to a continuous loss which will have to be made up by the taxpayers. Should the government enter into these enterprises too extensively, the additional taxes which would necessarily be levied upon taxpayers might easily become extremely burdensome to them.

UNDER such conditions, it is difficult to see how the people would be benefited, how it would raise their standard of living, how the country would be made more prosperous. The real facts would be that the current generated would be costing the people more than it would were it generated in steam plants. What they did not pay in rates, they would pay in taxes. If the rates were too low to meet the cost, people who did not enjoy the benefits of the low rates would still have to pay the taxes which made those rates possi-

¶ "IF *the greatest possible amount of power is to be extracted from a given river, one dam must be built below the other right on down the river and the dams need to be high enough and close enough together so that the water from one dam is backed up to the foot of the next dam above. Back of each dam the area which the water covers should be great enough to enable impounding a sufficient quantity to provide an even flow the year round to the water wheels.*"

ble, if it was the Federal government which was developing the water-power sites and selling the power.

Of one thing we may rest assured. Private industry will develop our water-power resources just as rapidly as it is economical to do so. Electric light and power rates have been reduced steadily since electric current was first sold. The search is still going on for ways and means of reducing the cost still more. It requires less than a fourth as much current to produce a given amount of light now as it did forty years ago. The amount of fuel required to generate a unit of electricity is only a third of what it was during the war.

Fortunes have been made in the business, it is true. Fortunes, also, have been made in other lines of business, in oil, automobiles, meat packing, manufacturing, even a farmer or two might be found who has prospered to a marked degree.

THERE is a grave question in the minds of a great many people as to whether the fortunes made in the electric power business actually total as much as the money which will be squandered by the politicians who have charge of future water-power developments if the government takes over the power business. Also, there are those who fear the annual loss which will have to be made up by the taxpayers will total more than the combined income of all the present power magnates. In short, there are reasons for arriving at the conclusion that the government is taking an extremely uneconomic course in carrying on its electric power program.

Odd Items in the Public Service

TELEPHONE: A Virginia resident recently had a dog which he believed was psychic. Seems the telephone bell went on the blink, but the pup took over the phone bell's job. He'd howl every time somebody wanted his master's number on the phone. Upon investigation it developed that the dog was usually chained to the telephone ground pipe and the electric current which was supposed to ring the bell would become grounded through the dog's body as he laid on the damp cellar floor, thereby causing the pup to give the signal instead of the bell when a call came.

GAS: During the recent war scare in England, the government distributors of gas masks encountered one old lady who absolutely refused to accept the device, simply explaining that she couldn't "afford to keep one." "But they cost you nothing at all," explained the puzzled defense official. "Yes, I know all about that," replied the old lady. "That's what the smart young chap said who sold me my gas stove!"

ELECTRICITY: Some months ago an Illinois circuit court judge had to decide whether electricity should be taxed as a tangible commodity. Two Nobel prize winners testified in opposite directions. Dr. Arthur H. Compton (N. P., Physics, '27) said electricity was tangible because it could be seen, felt, heard, and tasted. Dr. Irving Langmuir (N. P., Chemistry, '32) said electricity was intangible because it could *not* be seen, felt, heard, nor tasted. Judge Fisher listened, pondered, scratched his head, and ruled electricity a taxable, tangible commodity.

Wire and Wireless Communication

THE administration bill for a triumvirate FCC is doomed. Such is the Washington consensus before the measure has even reached the stage of committee hearings. Its doom was sealed by the scorching attack delivered against it by Senator White, the Maine Republican. (Reprinted in the *Congressional Record* of February 17, 1939.)

The more recent outbreak of the feud between Chairman McNinch and Commissioner Craven over alleged censorship complicates the situation but makes it less likely than ever that Congress will reorganize the FCC on a 3-man basis, so as to turn it over to the principal control of Chairman McNinch.

Senator White followed his attack by introducing a bill of his own (S. 1520) for an 11-man FCC. This bill, which Senator White probably hasn't the slightest idea of putting over in its present form or under his name, now functions as a counterirritant by playing up the bureaucratic tendencies of the administration's proposal and by providing a concrete alternative for the opposition whenever the subject of doing something about the FCC comes up.

As a result of these developments, Senator Wheeler, chairman of the Senate Interstate Commerce Committee, who agreed to sponsor the 3-man commission bill, is already said to be wavering in his unqualified support of the bill which bears his name.

Be that as it may, the Montana Senator decided to have his committee hold hearings on railroad legislation ahead of the 3-man FCC bill. This means that it will probably be April before the Senate committee can go into FCC matters, if at all. There is no help coming from the other side of Capitol Hill. Chairman Lea of the House Interstate and Foreign Commerce Committee introduced a duplicate of the Wheeler bill under his own name. But other than such routine coöperation, it is apparent that the House committee is inclined, for the present at least, to wait and see what the Senate does before doing anything on its own.

WHAT may come of all this maneuvering is that next month, or later on in the session, one or the other of the congressional committees will take up for active consideration the Wheeler bill or the White bill, or one of the several FCC-radio investigation resolutions which are lying around. It probably wouldn't matter which particular proposal were used as a starting point since the result would be the same—a recess investigation of the FCC with the idea of formulating a basis for an intelligent and general overhauling of the Communications Act at the next session.

Whether such an important reorganization could be accomplished even by 1940 is doubtful, especially in view of the increasing influence of the coalition in Congress between the unified Republican opposition and a substantial bloc of dissident Democrats. If Senator White

proposes and succeeds in lining up the issue along such lines of political division, it is quite possible that the 76th Congress will pass into history without doing anything definite about the FCC other than investigating it.

SENATOR White's attack on the administration's 3-man commission bill was focused almost entirely upon Chairman McNinch. The Senator recalled that since Mr. McNinch was confirmed nearly two years ago, the FCC—instead of making constructive recommendations as to policy—has bent its efforts to resist congressional investigation, notwithstanding President Roosevelt's recent expression of dissatisfaction with the "present legal framework and administrative machinery of the commission."

The Senator also recalled that the proposal to cut the membership of the FCC not only marks a departure from the considered judgment of Congress (when it increased the old radio commission by two members to become the present FCC), but is apparently inconsistent with previous statements by Chairman McNinch himself on the subject of FCC membership. Respecting the proposal to set up three administrative assistants (provided by the Wheeler bill), Senator White contended that the Communications Act, as now written, gives the FCC complete authority to set up such an arrangement if it wants to do so.

Furthermore, he pointed out that Chairman McNinch, immediately after taking his post at the FCC, succeeded in abolishing the old 3-divisional system:

> In 1937, according to Mr. McNinch, "the aggregate wisdom and judgment of seven minds is surely greater than any two or three of the seven." Can it be that in 1939 this is no longer true? Must we now understand whatever seven minds might have had of knowledge in 1937 that in this good year of 1939 the aggregate wisdom and judgment of three men is greater than that of the seven? The plain truth of the matter is that the aggregate wisdom and judgment of seven men is not now wanted. Mr. McNinch, in the name of coöperation, demands the yielding to his direction of the experience, knowledge, judgment, and conscience of the other commissioners. And it is because some commissioners will not thus unconditionally surrender that they are to be legislated out of office. A legislative purge of commissioners of independence and courage is now demanded.
>
> Stripped of all pretense, this bill, in disregard of all previous congressional purpose and drafted without present congressional study, proposes, through his statutory administrative control of the division assistants and through his influence as chairman, to vest in one man authority over the vast communication interests of this country and in particular a life-and-death power over broadcasting, one of the two means of reaching the mind and influencing the thought of America. The bill makes contribution only to the political efficiency of the commission. It does this through the centralized power hereinbefore referred to, and through the provision transferring all officers and employees of the present commission, other than the members thereof whose offices are abolished, from their present protected civil service status to a temporary status. It serves no good end whatsoever. The bill is crude in draft, wrong in principle, political in purpose, and carries in its terms and implications a sinister threat to all our communication facilities and to the country itself.
>
> No statutory change is necessary in order to make effective the framework and administrative machinery of the commission. It does require legislation to abolish the present commission of seven and to create a commission of three and to centralize power in the chairman as is now proposed. It does require legislation to force out of office men who think for themselves and who act independently and courageously. These are the real reasons for the McNinch bill.

SENATOR White's own bill to set up an 11-man FCC contains a 2-divisional feature of special interest to telephone and telegraph companies and other so-called common carriers of communications. As indicated above, the White bill in its present form has slight chance of enactment by the 76th Congress. But because there is much to be said for Senator White's 2-division plan on its own merits, it is worth noting. It may be that this plan will turn out to be the basis for future FCC legislation when Congress finally gets around to it.

The White bill would set up two divisions within the proposed 11-man FCC: (1) Division of Public Communications, and (2) Division of Private Communications. Each division would have five

members and within its own sphere of "judicial and quasi judicial functions" it would operate independently of its companion division.

The respective spheres of jurisdiction would be the same as telephone company witnesses suggested years ago during the hearings on the present communications bill. The line would be drawn between (1) point-to-point communications operation generally of a commercial nature, such as telephone, telegraph, radio-telephony, cablegram, radiogram, and so forth; (2) communications involving public reception, which means principally radio broadcasting.

The purpose of the segregation is obviously to give the important commercial communications industries more regulatory attention. It will be recalled that Chairman McNinch told Congress only last January that the FCC devotes 90 per cent of its attention to radio broadcasting. In view of the much larger investment in the five billion dollar telephone industry and the national importance of commercial communications generally in comparison with what is essentially an entertainment service—radio broadcasting—the present emphasis on the latter by the FCC does suggest a regulatory paradox. Regulatory students understand, of course, that because of its controversial nature radio necessarily occupies most of the attention of the FCC. But the telephone and telegraph men have long felt that Federal regulation of their own industry would work more smoothly and satisfactorily if it were segregated from the sensational arena of radio regulation.

Under the White bill the chairman would be the eleventh member of the FCC and would not partake in the regulatory functions of either division, except to fill in temporarily. He would, however, have administrative control of the commission and act as a coördinator between the two divisions. He would have a vote as well as be a presiding officer at those sessions of the commission where it would operate as a whole—such as the adoption of general rules and policies.

One other angle of Senator White's bill was the extension of authority to merge two communications carriers other than telephone companies. Under the Communications Act as presently written the FCC has authority to approve the merger of telephone companies only.

At the FCC staff members were just breathing a little easier in the knowledge that there will probably be no reorganization legislation this session when the McNinch-Craven duel over censorship reduced the harassed agency again to its customary state of jitters.

The opening shot was fired by Commissioner Craven in the form of a minority version of a report by a FCC subcommittee on programs, of which he is a member. The majority of the report, signed by Commissioners Sykes and Payne, had undertaken to class certain programs as being contrary to public interest. It was later explained by Chairman McNinch that this report was simply for the guidance of the commission staff. Programs found likely to be objectionable included those featuring clairvoyance, false advertising, anti-religious, antiracial, and one-sided controversial discussions, obscenity, superfluous or objectionable advertising, etc.

Commissioner Craven's opinion held the adoption of the committee report by the FCC as exceeding its powers and tending towards censorship.

The following day, February 28th, Chairman McNinch threw aside all semblance of courtesy towards his fellow commissioner and accused Commissioner Craven of indulging in a "one-man grand stand play" by trying to raise a spurious issue of censorship where there was, in fact, no basis for such alarm. The chairman pointed out that Commissioner Craven was alone in his view and that certain newspapers had shamefully misrepresented and distorted the situation. Without attempting to award honors to either party in this dispute, most Washington observers are inclined to believe that it merely made more certain a congressional investigation of the FCC.

THE commission expects to revise aviation radio rules in the near future and is studying the results of experimental licenses which have been issued to radio manufacturers and airline companies to develop "staticless" transmitters and receiving sets. These licenses use ultra short wave frequencies exceeding the 60,000 kilocycle limit. In its coming deliberation, the commission will determine whether to grant permanent commercial licenses on the basis of such experimental operations.

* * * *

THE recently released figures from the 1937 U. S. census of the telephone industry brought to light two interesting facts: (1) That the Census Bureau figures, especially with relation to employment, correspond pretty closely to statistics compiled by the Bell System, although different methods of approach were used. (2) That notwithstanding the considerable amount of conversion from manual to automatic (dial) switchboards that has taken place during the last five years, there has been no appreciable decrease in the number of telephone employees, although telephone salaries and wages rose sharply during that same period. These figures would seem to dispose of some of the fears of labor leaders that the introduction of the dial telephone is resulting in technological unemployment among central station operators.

Census figures were released by Director William L. Austin of the U. S. Bureau of Census. The highlight of this preliminary report was the revelation that the number of telephones, as well as operating revenues of telephone companies in the United States, increased more than 11 per cent between 1932 and 1937. According to the returns received from 38,801 systems and lines, plus data for the connecting lines having fewer than five telephones, the total number of telephones in use in the United States on December 31, 1937, was 19,453,401 compared with 17,424,406 on December 31, 1932, an increase of 11.6 per cent. Telephone operating revenues increased 11.2 per cent, from $1,061,530,140 in 1932 to $1,180,028,372 in 1937.

Although the number of employees (reported for June 30th) showed a slight decrease of three-tenths of one per cent, from 334,085 in 1932 to 333,162 in 1937, the salary and wage payments increased 12.8 per cent during the same period, from $458,116,677 to $516,640,009. The principal statistics for the public telephone systems and lines in the United States, for 1937, 1932, and 1927 are summarized below.

PRINCIPAL STATISTICS—ALL SYSTEMS AND LINES: 1937, 1932, AND 1927

	1937	1932	1927	Per cent of increase or decrease (-) 1932–1937	1927–1932	1927–1937
Number of systems and lines	38,801	44,828	60,148	-13.4	-25.5	-35.5
Miles of single wire	90,787,172	87,677,586	63,836,182	3.5	37.3	42.2
Number of central offices	18,967	19,228	20,227	- 1.4	- 4.9	- 6.2
Number of telephones, total	19,424,200	17,424,406	18,522,767	11.5	- 5.9	4.9
Residence	12,349,933	11,089,946	12,128,617	11.4	- 8.6	1.8
Business	7,074,267	6,334,460	6,394,150	11.7	- 0.9	10.6
Number of calls (originating with systems reporting)	33,618,333,461	30,048,165,513	31,614,172,621	11.9	- 5.0	6.3
Number of employees:						
At close of June	333,162	334,085	375,272	- 0.3	-11.0	-11.2
At close of year	325,943	.....	.....	..	..	..
Salaries and wages	$516,640,009	$458,116,677	$486,597,070	12.8	- 5.9	6.2
Operating revenues	$1,180,028,372	$1,061,530,140	$1,023,573,567	11.2	3.7	15.3
Investment in plant and equipment	$5,000,456,220	$4,791,902,525	$3,548,874,716	4.4	35.0	40.9

Financial News and Comment

By OWEN ELY

Are We Headed for Inflation?

The administration has now abandoned all efforts toward currently balancing the budget and has thus rather openly embarked on the uncharted seas of inflation. Earlier this year it was indicated that a moderate increase in taxes—inheritance and other—might be proposed as a partial offset to the new armament expenditures, but latest reports indicate that, at least as far as business is concerned, no important new taxes need be feared. The administration's new philosophy is that the best way to balance the budget is to raise national income one-quarter or more, to the eighty billion level, in order that present tax rates will yield enough additional revenue to meet the current deficit; but there seems little assurance that with this income goal attained, appropriations for armaments, old-age pensions, "conservation" and farm programs, etc., will not increase beyond present levels.

Thus far domestic inflation has been limited largely to partial "reflation" of the depressed 1932 price levels in terms of currency. International prices in terms of gold, as measured by the new General Motors-Cornell price index, are around the lowest levels of several decades, due to desterilization of gold, dislocation of international trade by nationalistic programs, etc. In terms of currencies, however, prices are showing a gradual inflationary trend and the huge new armament programs of the democratic nations should have stimulating effects on raw material prices. While price indices dropped rather sharply in the second half of 1938, this was largely due to the plethora of farm products and the resulting price declines in grain, cotton, etc. The U. S. Bureau of Labor Statistics' index of wholesale prices, excluding farm and food commodities, dropped only slightly last year due to the depression.

A glance at a chart of our banking statistics, with net demand deposits and reserves, gold stock, money in circulation, etc., at record high levels, would indicate that the groundwork had been well laid for an inflationary era. The only thing that has prevented inflation from "catching hold," in the writer's opinion, is the lack of coöperation between business and government and the frequent changes of policy at Washington which have prevented business from planning ahead. In 1933, with NRA, we had a sudden dose of inflation, which subsided in the general confusion attending the end of that experiment. In 1936-37 forward stocking of inventories, due to labor troubles, advanced material prices until President Roosevelt's sudden declaration that copper prices were too high. The latter, together with a sudden extremely sharp contraction of excess bank reserves by Federal order, caused temporary deflation. Excess reserves were partially rebuilt in 1938, although the ratio to required reserves is still well below the 1935-36 level.

While business confidence has been partially restored, commercial loans are still in a declining or level trend and business men are still holding inventories at a relatively low level. Volume of production, as measured by the Federal Reserve index, recovered to about the halfway point of 104 in December—it is probably now around the 99 level—and building activity has shown consistent gains; but we have yet seen only the modest be-

ginnings of a renewed inflationary trend.

The administration formerly tried to create inflation overnight by cutting the dollar to 59 cents; it is now adopting the more orthodox method of encouraging business to expand. If New Deal experiments such as TVA are held sufficiently in check, business will expand of its own volition; and the example of unbridled extravagance set by the government may in time lead business into the same habits of mind. Once the process really begins, and provided foreign conditions and present New Deal legislation do not impose too many technical obstacles, inflation may grow at a more rapid rate.

In 1916-20 we had dual inflation by government and business, with resulting high wages and commodity prices, which crashed in 1921. Subsequently, with business given a free rein by Washington, inflation in real estate and security prices became rampant, culminating in 1929. Since 1930 business has deflated, while government has inflated. If the two now join hands to inflate the final result is only too obvious.

Many economic prophets have endeavored to "time" inflation without success. There are too many intangibles involved. Washington blows hot and cold, and business has chills and fevers. But given a few years of definite encouragement by Washington, as now seems possible, we may embark on an era of business expansion which will sharply lift commodity and security prices. This seems particularly likely if a conservative administration is installed in 1940.

Hopkins' Address Improves Market Morale

WHILE some commentators remain skeptical regarding the genuineness of the administration's new "goodwill" policy, Secretary of Commerce Hopkins' recent Des Moines address was particularly encouraging due to its specific character. Regarding utilities, Mr. Hopkins said in part:

> There has been no indication that government wishes to own and operate all the utilities of this country. Rather do I see the government determined to write rules adequately protecting all the people—to help make cheap electricity available to every one and to ban unholy profits from watered stock. In making the peace, the government demonstrated its good-will by settling on generous terms. It struck a peace that will be a lasting and good peace, because it is a generous peace.

The high lights of Mr. Hopkins' evening address were generally known in the financial district early on February 24th, and on that and the following day the stock market enjoyed an advance equivalent to nearly four points in the Dow-Jones industrial average and nearly one point in the utility average (the percentage gain being somewhat larger for the utilities). Temporarily, the market has had some relief from European war scares; and if this continues, it seems likely that the current advance will carry to moderately higher levels. However, based on a study of seasonal characteristics of bull markets over the past eighteen years, it is unusual for the spring and summer advance to get under way much before March 25th. The traditional "Ides of March" and the March 15th tax selling remain as market obstacles.

Bond Prices Approaching Peak Level?

MANY past prophecies regarding a turning-point in the bond market have proved futile, but nevertheless there seems good reason to believe that prices are at last approaching "the top of the mountain." The hesitation of investment bankers to initiate any important volume of financing thus far in 1939 may be a straw pointing in that direction. Institutional buying of highest-grade obligations continues to appear, but with a distinct tendency to avoid increasing the bids for this class of security.

Standard Statistics index of "Inverted Interest Rates" (based on choice commercial paper, 4.70 per cent equals 100) remains around the highest level of the past fifty years—184.1 compared

with 178.7 a year ago. *Standard's* index of high-grade utility bond yields has dropped from 5.19 per cent in 1924 to 2.66 per cent in February, 1939, the latter figure comparing with 2.95 per cent a year ago, 3.08 per cent two years ago, and 4.94 per cent in February, 1932.

The demand for highest-grade bonds is largely a reflection of the amount of institutional funds seeking investment. As soon as the demand for commercial loans picks up, the banks may become sellers rather than buyers, on balance, and this may reverse the trend or at least keep bond prices on a "plateau." Of course, the Treasury and the Federal Reserve are important and unpredictable factors, but it seems unlikely that they would desire still higher levels for governments, some of which have been sold on a "negative" yield basis.

Commercial loans during a period of prosperity usually lag far behind business activity, stock prices, bank deposits, etc., because of the tendency to liquidate old loans and reluctance to rebuild inventories. However, sometime this year it seems probable that industry may require additional funds, with resulting inroads on bank funds and bond prices. The accompanying table shows recent prices and yields of representative utility bonds of various classes, with earnings coverage, call prices, etc.

REPRESENTATIVE ELECTRIC LIGHT AND POWER BONDS
(Arranged in order of Yield to Maturity)

	Approx. Price	*Present Call Price*	*Current Yield*	*Yield to Maturity*	*No. Times Interest Earned***
Consolidated Edison of N. Y. deb. 3½s 1948 ..	106⅜	104	3.27%	2.68%	3.0
Commonwealth Edison Co. cv. deb. 3½s 1958	110¼	104	3.17	2.82	2.1
*Detroit Edison Co. gen. & ref. "G" 3½s 1966..	111	110	3.15	2.94	2.3
*New York Edison Co. 1st & ref. "E" 3½s 1966	108¼	107	2.99	2.95	3.0
*Phila. Elec. Co. 1st & ref. 3½s 1967	110½	107½	3.16	2.96	3.5
*Consumers Power Co. 1st 3½s 1970	109½	108	3.19	3.05	2.9
*Pac. Gas & Elec. 1st & ref. "I" 3½s 1966	107¼	107½	3.26	3.12	2.8
Public Serv. Co. of No. Ill. 1st 3½s 1968	107⅜	107	3.26	3.12	1.6
*Cent. Maine Pwr. Co. 1st & gen. "H" 3½s 1966	102½	106½	3.42	3.37	2.1
*Ohio Pub. Service Co. 1st 4s 1962	107⅜	107	3.71	3.51	2.8
Ohio Edison Co. 1st 3¾s 1972	103¼	109½	3.63	3.58	2.1
San Antonio Pub. Serv. Co. 1st 4s 1963	105⅜	105(a)	3.78	3.64	1.9
Cent. Ill. P. S. 1st & ref. 3¾s 1968	100¼	106½	3.74	3.74	1.7
Sioux City Gas & Elec. Co. 1st 4s 1966	103⅜	105	3.85	3.77	2.0
Montana Pwr. Co. 1st 3¾s 1966	98⅜	106(b)	3.80	3.83	2.0
*Jersey Central Pr. & Lt. 1st 4½s 1961	105½	104	4.27	4.13	2.0
Nor. Indiana P. S. 1st & ref. 4½s 1970	104¼	104	4.32	4.26	1.7
Texas Power & Lt. Co. 1st & ref. 5s 1956	104⅜	104	4.77	4.62	1.8
Iowa Public Service Co. 1st S. F. 5s 1957	104½	104	4.78	4.65	1.6
Arkansas Pr. & Lt. 1st & ref. 5s 1956	103¼	104¼	4.84	4.73	1.7
Ala. Pwr. Co. 1st & ref. 4½s 1967	94¼	101	4.77	4.86	1.7
Texas Elec. Service Co. 1st 5s 1960	100¼	104½	4.99	4.98	1.7
Ill. Pwr. & Lt. Co. 1st & ref. 5s 1956	97½	105	5.13	5.21	1.3
Continental Gas & Elec. Co. deb. 5s 1958	90	102	5.56	5.84	1.5
Electric Pr. & Lt. Co. deb. 5s 2030	78¼	106	6.40	6.41	1.2
United Lt. & Rys. Co. (Del.) deb. 5½s 1952 ..	88⅜	103	6.13	6.59	1.5
Community Pr. & Lt. 1st coll. 5s 1957	81⅜	105	6.11	6.67	1.5
Portland Gen. Elec. 1st & ref. 4½s 1960	71¼	104	6.31	7.04	1.4
Cities Service Pr. & Lt. deb. 5½s 1952	81½	103	6.75	7.47	1.3
United Light & Power Co. deb. 6s 1975	77½	110	7.74	7.87	1.3
Virginia Public Service deb. S. F. 6s 1946	88⅜	101¼	6.81	8.27	1.3
Interstate Power Co. 1st 5s 1957	64	103	7.81	9.10	1.0
Standard Gas & Elec. deb. 6s 1951	64	103	9.37	11.25	1.0

*Legal for savings banks and trust funds in New York state.
**From latest earnings statements, as compiled by Fitch Service.
(a) Also callable for sinking fund at 101.
(b) Also callable for sinking fund at 103.

Appliance Sales Expected to Gain 25 Per Cent

PRESIDENT Carl L. Peirce, Jr., of the National Electrical Manufacturers Association recently predicted that gains in the electrical appliance industry for 1939 might amount to as much as 25 per cent over 1938. "Many factors point to better business for the industry in 1939," he continued. "Residential building is increasing, the desire for living electrically is more widespread, the demand for electric service is growing, and utility modernization and expansion are continuing although still restricted."

Mr. Peirce said that the electrical association is coöperating enthusiastically in the national efforts to increase the sale of electric ranges, water heaters, refrigerators, and other household appliances and to promote modernized kitchens and adequately wired homes.

Members attending the meeting reported that they had observed definite signs of betterment in the electrical goods industry. Refrigerator makers said that the new lines had received an excellent reception from wholesalers and that January sales showed a sharp jump over those for December. Electric range and roaster manufacturers were also optimistic and predicted substantial sales gains. Electric dish-washer makers were preparing to discuss a promotional plan similar to that employed for the other major appliances.

THE beneficial results of load-building campaigns for sale of electric appliances are reflected in the excellent growth of residential kilowatt-hour sales, as compared with commercial and industrial. As indicated in the accompanying table, in 1930-32 residential output was better maintained than commercial and industrial. In 1933, the showing was less favorable, and during 1934-37 the increases averaged about the same as for the other two branches of the service; but in 1938, the showing was most impressive — residential output gaining an estimated 10 per cent, while industrial sales were down nearly 18 per cent. This result may be due in part to the normal lag of residential sales in reflecting depression conditions, but also seems due to the industry's special appliance campaign, including the "combination package" sales method so successfully demonstrated by Consolidated Edison of New York.

It is estimated that in 1938 about 36 per cent of total electric revenues was derived from residential load, 28 per cent from small commercial consumers, and 36 per cent from industrial and miscellaneous.

ANNUAL PERCENTAGE INCREASE IN KWH. SALES

Year	*Residential*	*Commercial*	*Industrial*
1929	13.1%	12.1%	13.9%
1930	12.3	6.4	D 6.6
1931	6.2	D 2.9	D 8.0
1932	1.1	D10.6	D16.2
1933	D 1.2	D 4.3	9.3
1934	7.7	5.9	9.1
1935	10.3	10.7	10.6
1936	11.1	14.9	19.1
1937	12.6	12.5	10.1
1938 (est.) ..	10.1	5.4	D17.7

New Financing

SINCE the North American Company financing early in February there have been no large utility issues, despite the success of that offering. The reason probably lies in the unsettled character of the stock market, renewed fears of a European debacle, etc. Now, however, with the improved sentiment at Washington, one or two large deals and a number of small ones are "on the fire," with the probability that a moderate amount of financing may be ready for the latter half of March or early April.

Offering of $4,500,000 Central Maine Power Company 1st 3½s of 1968 was made February 24th at 102 by First Boston Corporation and Coffin & Burr, Inc.

It is reported that Pacific Lighting Corporation plans to do a $7,000,000 refunding operation through private sale to institutions.

Discussions among bond men indicate the possibility of a large refunding op-

eration for Northern Indiana Public Service Company. In the neighborhood of $55,000,000 bonds might be involved, according to some opinion. This takes into consideration the belief that it would be logical to merge with the company the properties which it surrounds, which are owned by the Gary Electric & Gas Company. Plans announced sometime ago indicated that the Gary properties would be a logical tie-in with Northern Indiana.

Another important piece of financing said to be under consideration is the refunding of $121,000,000 Pennsylvania Power & Light Company first 4½s of 1981. The bonds are callable at 104½ compared with a current market around 105.

Refinancing of $4,400,000 Washington Water Power first 5s July of 1939 may be linked with a refunding operation in the $15,500,000 first 5s of 1960. White Weld & Company are the probable underwriters.

Filing of The Community Public Service $6,600,000 4s 1964 with the SEC February 16th broke the deadlock which previously existed on registrations. Paine, Webber & Company and Republic Company are the principal underwriters.

Memphis Power & Light Sale Agreement

THE city of Memphis and the TVA, after protracted negotiations, have reached an agreement with Memphis Power & Light Company to buy the electric and gas properties for $17,360,000. This amount was $3,640,000 less than the utility had originally asked. The city will pay $15,250,000 and the TVA $2,110,000. (See PUBLIC UTILITIES FORTNIGHTLY, Mar. 2, 1939, p. 311.)

According to President Sawyer,

> Cash from the sale of these properties, together with that realizable from retained net current assets, is expected to amount to about $22,000,000 and to permit the retirement of the company's bonds at the call price and, it is hoped, the liquidation of the preferred stock at $100 a share.
>
> The generating plant to be retained will be operated for the purpose of generating and selling power to the TVA and to the Mississippi and Arkansas power and light companies.

Closing of this deal marks the last major acquisition of private power facilities by Federal and municipal interests in Tennessee, as remaining private interests in that state are small.

Preferred stockholders of the Tennessee Public Service Company received notice that they would get $88.86 a share in the liquidation of the electric utility bought last September by TVA and the city of Knoxville. The $7,000,000 bonds were retired at 97.5. Approximately 85 per cent of the 50,000 shares of preferred stock was held by the National Power & Light Company, holding company for Tennessee Public Service and a subsidiary of the Electric Bond and Share Corporation. The remaining 15 per cent was held largely by residents of eastern Tennessee.

Corporate News

THE Federal Power Commission on February 24th denied the petition of the Niagara Falls Power Company for indefinite continuance of the hearing set for March 15th on its application to divert an additional 275 cubic feet a second of water at the falls. This is the last remaining fraction of Niagara water under American control which has not been allotted, and involves a number of questions concerning the use and control of the power development. The question has been pending some two years.

The SEC has approved, with certain conditions, including one that no dividends shall be paid on any stocks without its approval, a declaration by the New York & Richmond Gas Company (subsidiary of Washington & Suburban Companies) regarding reduction of its present capital, represented by 150,000 shares of no par common stock, from $1,500,000 to $850,000 by changing the stated value of the stock from $10 to $5.66⅔ a share.

INTERIM EARNINGS STATEMENTS

Electric and Gas	*No. of Months Included*	*End of Period*	*System Earnings per Share (a)* Last Period	Previous Period	Per Cent Increase	Per Cent Decrease
American Gas & Electric	12	Dec. 31	$2.23	$2.57	..	13
American Power & Light (Pfd.)	12	Nov. 30(b)	5.51	6.36	..	13
American Water Works	12	Sept. 30(c)	.36	1.38	..	74
Boston Edison	12	Dec. 31	8.38	8.72	..	4
Columbia Gas & Electric	12	Dec. 31	.31	.57	..	46
Commonwealth Edison	12	Dec. 31	2.40	2.45	..	2
Commonwealth & Southern (Pfd.)	12	Dec. 31(b)	7.91	10.08	..	22
Consolidated Edison, N. Y.	12	Sept. 30(c)	2.23	2.16	3	..
Consolidated Gas of Baltimore	12	Dec. 31(c)	4.06	4.63	..	12
Detroit Edison	12	Jan. 31	6.46	7.41	..	13
Electric Power & Lt. (1st Pfd.)	12	Nov. 30	5.74	12.35	..	53
Inter. Hydro-Electric (Pfd.)	12	Sept. 30(c)	3.61	18.46	..	82
Long Island Lighting (Pfd.)	12	Sept. 30	2.60	7.74	..	66
Middle West Corp.	12	Dec. 31	.77(e)	.56	38	..
National Power & Light	12	Nov. 30(b)	1.27	1.33	..	4
Niagara Hudson Power	12	Sept. 30(c)	.56	.87	..	36
North American Co.	12	Sept. 30	1.59	2.05	..	22
Pacific Gas & Electric	12	Sept. 30	2.42	2.84	..	15
Public Service Corp. of N. J.	12	Dec. 31(b)	2.34	2.67	..	13
Southern California Edison	12	Dec. 31	2.10(e)	2.22	..	5
Standard Gas & Elec. (Pr. Pfd.)	12	Sept. 30(c)	3.21	11.19	..	71
United Gas Improvement	12	Sept. 30(c)	.97	1.12	..	13
United Light & Power (Pfd.)	12	Nov. 30	6.58	8.36	..	21
Gas Companies						
American Light & Traction	12	Sept. 30	1.40	1.82	..	23
Brooklyn Union Gas	12	Dec. 31	2.25	2.57	..	12
Lone Star Gas	12	Dec. 31	.88	1.14	..	23
Pacific Lighting	12	Dec. 31	4.18	4.10	2	..
Peoples Gas Light & Coke	12	Dec. 31	5.74(g)	3.65	58	..
United Gas Corp. (1st Pfd.)	12	Nov. 30	11.97	25.58	..	53
Telephone and Telegraph						
American Tel. & Tel.	12	Nov. 30(c)	8.21	10.24	..	20
General Telephone (f)	12	Dec. 31	1.86	2.00	..	7
Western Union Telegraph	12	Dec. 31	D1.57	3.18	..	..
Traction Companies						
Greyhound Corp.	12	Sept. 30(c)	1.79	1.79	..	..
Twin City Rapid Transit	12	Dec. 31	D1.15	1.14	..	..
Systems outside United States						
American & Foreign Pwr. (Pfd.)	12	Sept. 30(c)	6.77	7.70	..	12
International Tel. & Tel. (d)	9	Sept. 30	.96	1.10	..	13

D—Deficit.

(a) On common stock, unless otherwise indicated following name of company; in some cases Federal surtax not deducted.
(b) Data also available for month indicated.
(c) Similar report also published for quarter ending same period.
(d) Excludes Spanish subsidiaries and Postal Tel. & Tel. Co.
(e) Estimated or preliminary.
(f) Including the earnings (exclusive of fixed charges of parent company) of Indiana Central Telephone Company and subsidiaries for periods prior to August 31, 1938, date of completion of reorganization of Indiana Central Telephone Company and transfer of assets to General Telephone Tri-Corporation.
(g) After reserve for rate litigation, $2.48.

What Others Think

TVA—Commonwealth & Southern Purchase Favorably Received

Not in a long time has any utility event resulted in such unanimously favorable reaction as the news that the Commonwealth & Southern Corporation had agreed to sell its Tennessee Electric Power Company property to the TVA for approximately $80,000,000. Editorials from the left, right, and center joined the alleluia chorus. The avowed objectives were quite varied and there was much conflict in the wishful thinking. Radical publications welcomed the purchase as the first substantial step in the direction of state socialism of an important national industry. Conservatives, more hopeful than definite, hailed the news as a possible omen that the long and economically wasteful warfare between the Federal administration and the electric power industry would soon be terminated, or at least restricted to isolated areas.

But all seemed to agree that the Willkie-Krug agreement was a step in the right direction, even if they did not concur as to which direction. Only a few tones of dissent were noticed, such as that of the die-hard government ownership advocate, U. S. Senator Norris, who felt that the Commonwealth & Southern was getting too good a bargain.

Reflecting the optimism of financial circles, *The Wall Street Journal* stated editorially in part:

> Although the sale of the Tennessee Electric Power Company properties to TVA does not constitute the end of a war, it is a fair appraisal to say that it at least marks an armistice. Moreover, it brings measurably nearer the point at which the end of the war *can* be achieved.

The *Journal* went on to say that peace between the utilities and the government would not be assured until there was abandonment of the Federal policy of giving loans and grants from Federal funds for the purpose of establishing competitive publicly owned utility systems, nor until there was established uniform accounting principles for publicly and privately owned systems.

From the left side the radical *New Republic* flavored its approval with some tart remarks about a deliberate strike of capital which would indicate that the editors of *The New Republic* have not lately been confronted with the problem of raising new money for the expansion of private utility property:

> Now, it is said, the private utilities, which for years have been investing only about half the normal amount in expansion and new equipment, will go ahead with a large program. If so, this is good news, since utility investment has been in the past one of the three largest channels for the flow of capital which is necessary to diminish unemployment and create prosperity. But what an admission is here! It is, in effect, that the utility magnates have deliberately been engaging in a strike of capital, which they now call off. In order to hold up the government in its effort to provide the people with cheaper and more abundant electricity, they have consciously been engaging in the most gigantic sit-down strike of history, one that helped mightily to perpetuate the misery of millions. But the Supreme Court decision against them showed that the game of trying to prevent government competition was up. Mr. Willkie therefore accepted the best bargain he could get. Now it is up to the private companies to show that they can meet the needs for expansion of electric service, at a reasonable price, before government beats them to it. But let's not forget, if this happens, that capital *was* on strike in one of our biggest industries, in a literal and deliberate sense.

The usually 100 per cent New Dealish *Philadelphia Record* said of the purchase:

> Established as a yardstick for power it

[TVA] already has exerted a profound influence in cheapening the cost of electricity in the United States.

That means dollars and cents in the pockets of millions of American consumers.

No resort to lofty argument can explain that away.

No wonder many of the nation's utility leaders long since quit fighting the government and Federal regulation, and, instead, moved for coöperation which would recognize and serve the interests of all.

Right there, perhaps, is the greatest significance of the TVA settlement.

It represents the final conciliation of the die-hards, marks the end of the greatest of all Tennessee feuds.

THE erstwhile antiutility Scripps-Howard papers which have lately been troubled by the prolonged New Deal vendetta against the utility industries took the stout position that the issue between the TVA and Commonwealth & Southern had been a "key log in the jam of private capital investment." The resulting settlement naturally made the Scripps-Howard editors very happy. They stated editorially (from the *Pittsburgh Press*):

The billion a year or more that the utilities might borrow and spend for expansion, if assured that government power policy is to be fair and stable henceforth, would be only a start. They could well spend other billions to catch up with their 7-year construction lag. Spending by the utilities would create much direct employment and would stimulate activity in the heavy industries, which are most necessary to sustained recovery. And the example set if the government and the utilities would agree to get along together would be an immense encouragement to other industries and to investors who have idle billions waiting for work that offers reasonable safety and profit.

More cynical was the *Topeka State Journal* whose editors peeked behind at the possible motives of the TVA in suddenly agreeing to pay 50 per cent more than Mr. Lilienthal had once offered for the same properties:

It should be easy for any man who has shot ducks on the water to understand the $80,000,000 purchase of the Tennessee Electric Power Company by the TVA. The hunter picks out an individual duck at the far side of the flock. Then he waits until other ducks swim into the line of fire. A single shot under just the right grouping will yield a greater return in game than several shots a moment or two earlier or later would yield. If the individual bird at which he aimed escapes there will be later opportunities to get at it.

Washington hopes to get a lot of game in the flock of political possibilities, into which it fired the $80,000,000 TVA shot of public funds. The New Dealers are hoping that such ducks as resentment over the unemployment failure, the attempts to regiment farming, the fake social security schemes, and the dislike and fear of business generally for the administration swam into line just in time.

The big duck the administration is aiming at, on the far side of the flock, is continued control of the country after 1940. Billions in taxpayers' ammunition will be used and that bird will be the target for every shot that is fired from now until the votes are counted a year from next November.

The *Dallas* (Tex.) *News* and the *Los Angeles Times* were loud in their praise of Wendell L. Willkie for his part in winning more favorable terms for his company. The *Times* stated:

Willkie has been beaten in court and in Congress, but he won his fight in the court of public opinion. The administration was getting entirely too much unfavorable reaction from its attempt to destroy the utilities of the Tennessee valley by unfair competition. It is too much to hope that TVA has been chastened to the point of putting its operations on a business basis. It has gone too far in the distribution of electricity heavily subsidized by taxpayers' money to be able to retreat; but having now an unregulated monopoly within the state, it will at least not need to go any farther.

NEARER to the situation than most other papers was the *Knoxville* (Tenn.) *Journal*, which was inclined to give personal credit also to TVA officials. The *Journal* editorially stated:

It was at the first TVA board meeting on January 26th, this year, that Mr. Pope was instrumental in the promotion of present chief power engineer J. A. Krug from his former position of power planning engineer, and that Mr. Krug was shortly dispatched to New York to take up the negotiations with Commonwealth & Southern where Mr. Lilienthal had failed to conclude them.

It will occur to many that perhaps the difference between the success of Mr. Krug, under the apparent tutelage of Director Pope, and the failure of Director Lilienthal in an identical situation, was that of approach.

The Courier-Journal

NEW EVIDENCE IN THE "SCUTTLE"

More sober was the appraisal of the situation by *P. U. R. Executive Information Service*—a Washington weekly letter devoted to utility matters—which reminded its readers that while the Commonwealth & Southern-TVA terms were more favorable than had been previously expected in some quarters, they were, nevertheless, essentially and merely "liberal terms of surrender." After analyzing various angles of the deal, it stated:

> In view of the foregoing factors, a cautious appraisal of the present situation would seem to be as follows: Federal socialism in the electric power industry has taken

its first major step. It is here to stay. Private enterprise has been forced to retire from a substantial area of commercial operation, but by the same token the Federal government is now at the crossroads.

It can turn to the right by restricting its operations to an experimental basis within geographical limitations. If this is done—and it may be done under more conservative Federal policies of a new administration, or even under what is left of the present administration—there is no reason why private investment cannot continue to occupy, peacefully and profitably, the major part of the electric power field. In this respect we have in England and other European countries examples of public and private utility enterprise thriving side by side for years under the mutual observance of territorial agreements.

Or the government can turn to the left and follow up its consistent drive in the direction of annihilating private enterprise. By unfair subsidy, and by the continued use of subterfuge to cover up its real socialistic purpose, the Federal government can become such a threat to the continued existence of a prosperous private utility industry that investment will become paralyzed and further expansion of the private industry impossible.

Taking a long-range view, a number of factors suggest the probability that the course of the Federal government will eventually swing to the right. But even so, such a swing may take some time, during which further damage to the private industry may be sustained. For the immediate present, watch these two things: (1) The treatment accorded the private utility company in the city of Memphis, Tenn., and (2) the administration's part in any proposals in Congress for new hydroelectric projects. These will provide valuable clues as to the true direction of events.

PROBABLY this very picture of the Federal government at the crossroads of more and more government ownership or a more restricted and well-defined policy may explain why both left and right camps seem to be deriving comfort from the very same omen. Perhaps it is because they already visualize the Federal government taking the respective road of their choice. The conservative observer, however, is more likely to wait awhile before jumping to conclusions.

The recent action of the House of Representatives in curtailing TVA expenditures with respect to further construction on Gilbertsville dam may be another straw in the wind, notwithstanding its subsequent restoration of TVA appropriations at the Senate's insistence. It does show the growth of a more critical attitude in Congress towards Federal spending on hydro-power projects than has been noticeable at any time since the New Deal began.

The Tax on Government Securities And Employee Income

IN these days of spreading public ownership of utilities, both of the Federal and local variety, any movement in the direction of taxing government activities becomes automatically of interest to utility circles. For one thing, such taxation, if applied directly to publicly owned and operated utility functions, is a step towards removing the inequality in operation which private utility industries have always complained about as constituting an unfair subsidy. This becomes of increasing importance in view of the tendency to compare publicly and privately operated utilities on a basis of rates to the ultimate consumer.

There is also the fair probability that in the event and to the extent that tax exemption features are eliminated from Federal and local government securities, a good proportion of this investment might be driven into the field of public utility securities which might thereby become correspondingly more attractive to the investor.

Of course, the general discussion of taxing governmental activities from the utility point of view resolves itself upon closer inspection into three definite subdivisions: (1) The possibility of taxing publicly owned utility plants as property or as an operating business just as pri-

vately owned utility companies have their properties and business taxed. (2) The possibility of taxing revenue bonds or other securities which a political subdivision, such as a public power district, might issue to set up a publicly owned utility system. (3) The possibility of taxing the income of officials and employees of public utility plants owned and operated by the Federal government or some state or local public agency.

The last item is probably of less importance to the utility industry as a whole and, of course, of chief importance to the individual government employee whose income might thus be subject to taxation. At most, such exemption of government utility employees' salaries constitutes only another, if minor, financial advantage (subsidized by the taxpayer) in favor of publicly owned utility operations and to that extent working to the disadvantage of competitive employment offered by private utility industries.

At any rate, as far as local publicly owned utility employment is concerned, the issue would seem to have been pretty well decided in favor of such taxation when the Supreme Court handed down its decision in the celebrated New York Port Authority Case.

THIS was the decision which President Roosevelt commended in his recent message to Congress looking toward the removal of all such tax exemption features—Federal, state, and local. And it was this message, it will be recalled, that resulted in the introduction by Representative Doughton, chairman of the Ways and Means Committee, of H. R. 3590, entitled "Public Salary Tax Act of 1939." Whether the New York Port Authority Case could be stretched in the opposite direction—such as would justify a tax levied by the state of Tennessee, for example, upon salaries of TVA employees—is quite debatable. Such an attempt would probably get snarled in a controversy over whether operations of the TVA were truly governmental or quasi proprietary. If the Doughton bill (which was still under consideration of the House of Representatives at this writing) ever should become law, all doubt on this point would be removed since it provides (§ 3) as follows:

> The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

As to the second class of taxation—the recent decision of the Indiana Supreme Court in city of Ft. Wayne *v.* Indiana State Tax Board throws some persuasive light. In this case the city of Ft. Wayne contested the legality of the Indiana statute of 1933 which would have required the city-owned electric and water utility systems to pay state and county taxes. The opinion by Judge Tremain held against the city in part as follows:

> There is no law that exempts municipally owned property simply because it is owned by a city or town. Property owned by the city and used as a proprietary business enterprise—that is, sale to consumers for a consideration—is regarded by the law the same as property owned by any individual or business corporation.

There still remains the question as to the constitutionality of a law such as proposed in the Doughton bill. And to this extent a 219-page report, recently released through the Government Printing Office by the Department of Justice, makes interesting reading if one can overlook the dryness of legal literature.

TO be very realistic, one must bear in mind that President Roosevelt probably made up his mind that he wanted such tax exemptions removed before he asked for a report on the subject. Then probably followed the usual formality of asking the Attorney General for an opinion, who promptly turned the assignment over to assistant

counsel of the Justice and Treasury departments. Ostensibly, the resulting memorandum prepared by Messrs. Morris, Key, Buck, and Gardner is an original, spontaneous, and independent legal conclusion arrived at solely on the basis of careful research and wholly disinterested deliberation. As a practical matter, it recalls the famous line of the celebrated musical comedy, *"I'd Rather Be Right,"* where that pseudo-Chief Executive, George M. Cohan, says, "Cummings, take a law!"

But it is none the less a capable legal document for all that; and only the cynic could derive much amusement in noting the labored struggles which the Department of Justice staff make in getting around that obstinate nineteenth century opinion of the Supreme Court, Collector *v.* Day (11 Wall. 113), and its equally stubborn companion, Pollock *v.* Farmers Loan & Trust Company (158 U. S. 601). What the report tries to say without putting it in such blunt language is that the Supreme Court has been following an erroneous line of reasoning all these years, and that the great Chief Justice Marshal's observation to the effect that "the power to tax is the power to destroy" has been erroneously construed in subsequent decisions.

Anyway, the brief points out that when the Sixteenth Amendment to the Constitution was ratified in 1913, Congress was given the power to "lay and collect taxes on incomes *from whatever source derived.*" Whereupon the Department of Justice report sums up an impressive collection of "more recent" articles, mostly from the collegiate law journals and written by professors who habitually disagree with the law as it stands—any law.

In effect, therefore, this report is essentially a well-timed brief designed to run legal interference for the Doughton bill. The Doughton bill probably will not pass at this session of Congress, although it may pass at the next session or possibly the one after that. Anyway, it will pass eventually. When it does, and when somebody is brash enough to start a test suit, the Supreme Court will find the Department of Justice brief all handy and ready to tempt that august body into reversing itself.

As for the Doughton bill itself, there seems little doubt but that the Federal government can constitutionally wave the immunity against state and local taxation upon the incomes of Federal employees. But the second part of the bill, wherein the Federal government attempts to remove the immunity against Federal taxation on the salaries of state and local government employees, is the part which will precipitate opposition both legal and political. Already an array of municipal and state financial authorities, headed by Mayor La Guardia, has declared war on the measure before the House Ways and Means Committee.

So far no substantial effort has been made in Congress against removing the tax exemption feature of government securities—a step which would be bound to stir up a much more severe storm of opposition, not only from state and political subdivisions, but from insurance companies, banks, millionaire trust estates, and other investors in low interest, blue-chip securities. Indeed, the Federal government itself has much to fear by way of reprisal if taxation of government securities is put on a 2-way basis whereby states can get back at the Federal government for U. S. Treasury raids on their bonds.

Nevertheless, the Doughton bill in removing tax exemption from government employees' salaries is clearly the first step. A substantial movement to remove tax exemptions from all forms of government securities is bound to follow. In any event, private utility industries are quite likely to regard both as steps in the right direction—long overdue.

—F. X. W.

TAXATION OF GOVERNMENT BONDHOLDERS AND EMPLOYEES. THE IMMUNITY RULE AND THE SIXTEENTH AMENDMENT. A study by the Department of Justice, Washington, D. C. U. S. Government Printing Office. 1938.

Old King Coal Gets Hydrophobia

THE coal industry, which has long been uneasy over the growth of hydroelectric production as a result of the spread of subsidized Federal projects, seems to be really up in arms over the situation as of February 6, 1939. On that date John D. Battle, executive secretary of the National Coal Association, gloomily considered three recent events:

1. The U. S. Supreme Court had, one week before, denied all right of private industry to question the constitutionality of TVA or (by inference) any other Federal venture into the realm of competitive commercial enterprise.

2. The Commonwealth & Southern-TVA agreement brought home to the coal industry that one of its most important customers—the private electric industry—had surrendered to Federal competition, had retreated from one important area, and might subsequently retire elsewhere.

3. Engineers assembled at the annual convention of the alumni association of Stevens Institute of Technology gravely applauded an address by former President Hoover in which he bluntly stated that only political juggling of costs could cover up the engineering fact that fuel-generated energy can be more economically produced in general comparison with hydro.

The result of Mr. Battle's cogitations was a brief but bitter attack on TVA as a maker of unemployment. Mr. Battle's statement to the press on that date was as follows:

> TVA's $80,000,000 purchase of the facilities of the Tennessee Electric Power Company, as reported in the press yesterday, adds five hydro-power dams and three steam-generating plants, heretofore owned and operated by the private company, to TVA's system. In view of this development there is certainly less reason than ever for the construction by TVA of the three additional hydro-power dams for which it is currently seeking congressional approval and which if approved will entail additional expenditures of $166,000,000 out of the Federal Treasury.
>
> The interest of the bituminous coal industry in this situation is because our industry stands to lose a quarter of a million tons annually at a minimum in consequence of TVA's acquisition and prospective shutdown of these steam plants. This is something over which we have no control, but the fact remains that if more TVA hydro-power dams are hereafter created it will aggravate a situation that, from the standpoint of the coal industry, is already tragic. The victims of this situation are the thousands of coal miners and railroad employees whose jobs will be permanently destroyed by the permanent displacement of this coal tonnage.

IT was on the evening of February 3rd at Hotel Astor, New York city, that former President Hoover—on hand to receive an honorary degree of Doctor of Engineering—entertained his hosts with sarcastic references to President Roosevelt's policy of Federal development of hydroelectric power. Mr. Hoover said the electric power companies constituted the most recent of a series of "national demons" set up by politicians to gain the votes of the unthinking. He continued:

> For instance, kerosene oil was once the national demon. No one could win an election unless he opposed the villainies that were in it. Then came the engineer with his electric lamp and retired that fraction of the oil demon as a national menace.
>
> At one time canals were the national demons sucking blood from the toil of millions. Then came the engineer and made the railroads. In time the sick canals became the object of pity, and owners mostly loaded them off on the government. That was the time when capitalists gladly joined the socialists.
>
> Then for thirty or forty years the railways served in this high capacity of the national demon. It was a sin to say kind words about them. Their defamation was the sure road to election. But long before the statesmen had completed their job, the engineer had invented the gas engine and the pipe line. Now the railroads receive pity and solicitude from all. This included the bondholders. And we may yet see the owners of railways converted to socialism.
>
> Then rose anthracite coal to a very temporary position as the national demon. Before this supposedly grinding monopoly had served for more than half a dozen elections, the engineer had produced a dozen substitutes and that demon is now in complete anguish.

The Knoxville Journal

NOT ENCOURAGING TO THE BOYS ON THE TOW LINE

Then rose the electric power companies to the high place as the national demon. And they now occupy that hot spot. But many things are happening which should cause the demagogic mind to worry. He may need to hurry up and find a new demon. For instance, only twenty years ago we appeared to have 50,000,000 kilowatts of hydroelectric power. According to the politician, falling water is manna free from heaven. He omits to say that somebody has to pay for reservoirs, dynamos, and power lines. It is supposedly grabbed and sold to the people by wicked power corporations.

But the engineer has come along and reduced the coal consumption needed to make mechanical power from about three and one-half pounds per kilowatt hour to one-half pound per kilowatt hour. He has thereby turned many hydroelectric power houses into rust. And thereby he retires most of the potential manna back to scenery.

Mr. Hoover said the politician, who had not discovered that electric power could be produced so cheaply from coal, was still working away at getting elected upon the prospective joy to the electorate from hydroelectric power. He continued:

> I think if you will look about you, you will find that government is about the only person who now builds hydroelectric plants. We build them by the impulse of Congress, not by the impulse for low-cost power. It is all good for a few elections yet. And we will waste a few more billions of taxpayers' money to make this manna into power at places where the engineer could make it cheaper with fuel.

THE former President said that "we engineers" sometimes had bright economic thoughts which statesmen were slow to get. He pointed out that years ago engineers had announced that the way to lift the standard of living was to reduce waste and limit the cost of production. He observed that the lawmakers have apparently never heard of such principles, in view of the fact that they are busy increasing waste and costs by a variety of devices.

Mr. Hoover also said that when unemployment and higher prices result, public orators point an accusing finger at the engineers, and speak knowingly of "technological unemployment." He warned his engineer listeners that under prevailing circumstances they might yet become as a profession "a national demon."

Notes on Recent Publications

CASES ON PUBLIC UTILITY REGULATION. By Irston R. Barnes. F. S. Crofts & Co. New York, N. Y. Price $7. October 3, 1938.

Mr. Barnes, who teaches public utility law at Yale University, wrote his case book on public utilities after eight years of such teaching experience. During that time he periodically augmented preliminary drafts of his case selections so that the final result should be well tested in the light of actual teaching experience. With this in mind, it is interesting to note that Mr. Barnes has taken the course of several more recent case book editors in that he has made liberal use of state commission opinions, of dissenting opinions, and has not hesitated to cut up cases to suit the requirements of sequence.

However, a casual reading through the result by anyone familiar with the subject will not fail to leave the impression that Mr. Barnes is vindicated on all points, as he is on those other departures from more orthodox utility case books; namely, (1) his preference for stationary utility cases over the dozens of timeworn common carrier cases which so often clutter up utility case books (and whose regulatory technique is so rapidly becoming *sui generis* as compared with general regulatory principles); (2) his progressive expansion into the more modern fields of public ownership, Federal commission regulation, and intercorporate relations; (3) his forthright resistance to the temptation of that traditional time-waster—the utility status (which he covers in 55 pages).

None of these innovations is entirely original in the case book field, but the fact that the author accepts all of them and has done a creditable editing job withal shows progressiveness and awareness of what is the fastest moving department of law in the current decade. Mr. Barnes rightly anticipates that it is impossible "to defend each case included against all contenders for its place," and there seems to be no serious omission, nor for that matter any startling addition to the usual crops which have appeared in the case books of Robinson, Ruggles, Welch, Hale, Smith & Dowling, and others.

Critically speaking, Mr. Barnes passes rather gingerly over the important topic of operating expenses in the chapter (XIV) assigned to it. This is offset to some extent by fragmentary treatment of the same subject in cases appearing in other chapters. This is probably the result of the author's one conservative principle: He refuses to use portions of the same case in two or more different places. Instead, he employs a system of cross-reference citation titles, which may confuse some readers more than if he had cut up the case and had done with it. However, that is perhaps another matter of individual taste.

It is a little difficult to appreciate the purpose of the state-by-state division under Chapter XII, entitled "Rate Regulation—The Practices of State Commissions." One might understand an attempted broad distinction between the basic regulatory policies of the Massachusetts-California school as against the more conventional New York-Wisconsin leadership, but the grouping of cases under such states as Missouri, West Virginia, New Jersey, Indiana, etc., hardly

bears out the author's note (page 532) that there is little uniformity between the states beyond that imposed by Supreme Court precedent.

However, it is a harmless typographical segregation, even if it does seem to represent a distinction without a difference. Aside from preliminary statements at the beginning of each chapter to explain transitions, Mr. Barnes evidently doesn't believe in notes. Instead, proceeding apparently on the theory that it is better for the student to give than to receive, he has inserted a series of pertinent and very exploratory questions at the end of each chapter. While these are "provocative" and therefore of value as a stimulant to a student, it makes the work somewhat less satisfactory for the busy lawyer or interested layman who wants to know the answers right away instead of finding them out for himself.

In addition to an excellent index and representative bibliography, this book contains a unique and seemingly very useful table of contents whereby the titles of cases with their page numbers are insterted under a titular analysis and subanalysis of the subject by chapters.

TVA A DECEPTION; "Yardstick" a Fraud. By H. Styles Bridges. *Investor America.* January, 1939.

The author, Republican Senator from New Hampshire, together with Senator King, Democrat of Utah, at the last session of Congress introduced a resolution upon which was based the language of the joint resolution for the current congressional investigation of the TVA. After six months of inquiry, involving a record of testimony running into millions of words, Senator Bridges prepared this summary of results. His statements of fact were taken from the record of the hearings, but the conclusions are summed up as follows:

1. That the TVA "yardstick" rates are a brazen fraud on the public, the taxpayer, the consumer, and the investor.

2. That TVA's bookkeeping is lax, incompetent, deceptive, impossible of audit, and tends to conceal rather than to reveal the true state of fiscal affairs.

3. That past protests that TVA is a bona fide flood control and navigation project, and not primarily an adventure into socialism via the backdoor of Federal sale and distribution of electric power, are but a part of the reason Chairman Morgan charges the TVA with "dishonesty."

4. That TVA's pitiless destruction of investments in private utilities by ruthless duplication of existing facilities has been for the purpose of reducing the sale price of such properties to a below-cost point, low enough to create a capital rate base on which "yardstick" rates could pretend a semblance of realism. (In other words, the purpose of TVA's competitive policy is not actually to complete its threatened duplication—which would be costly to TVA also—but to spend enough money on duplication of lines as to bring private utilities to TVA's sale terms, at the expense of all investors in private utilities affected.)

5. That TVA's most potent aid in this policy of utility duplication has been another arm of the Federal government, the Public Works Administration. This clandestine affinity between TVA and PWA has been denied under oath in court proceedings. But the series of cumulative "coincidences" of such coöperation is so revealing that anyone of intelligence examining the record would place such oath-bound denials somewhere between legal quibbling and plain perjury.

6. That instead of being a "bankable" proposition, as its officers have claimed, TVA will (if and when it finds a market for all its power after completion) run an annual deficit of about $10,000,000 chargeable to its power facilities.

7. That TVA has violated the law (a) by its failure to observe the general code in relation to its annual audits by the Comptroller General's Office; (b) its failure to follow "even remotely"—to quote the Federal Power Commission—the Uniform System of Accounting established by the FPC as required by law; (c) its failure to establish its headquarters at Muscle Shoals, Ala., as legally required; (d) by ignoring the congressional requirement for nearly two years that TVA submit its allocation of costs; (e) by neglecting to maintain its nitrate plants in "stand-by" condition as required by law.

8. That TVA has been profligate with public funds, careless of its fiscal responsibilities; inefficient, theoretical, and impractical; dictatorial toward local inhabitants; a hopeless misfit for the task before it.

¶ "THE *economic life of a people is a dynamic thing, constantly changing, constantly developing. It thrives best in a free atmosphere. Once it is brought within the power of any man, board, group, or faction to control, it ceases to be natural and inevitably becomes restricted by the ideas, the comprehension, and the predilections of the men exercising the power. It is not a democratic system.*"

—JOSEPH C. O'MAHONEY,
U. S. Senator from Wyoming.

The March of Events

TVA Item Restored

THE Tennessee Valley Authority was free this month to carry on its plans for extension of the flood control and power program as the House and Senate stood in agreement on an appropriation of $17,206,000 for immediate use in dam construction work.

The House previously had refused the appropriation, but on March 1st reversed itself to concur with the Senate on that particular item. The House agreed, 184 to 175, to accept Senate amendments restoring the item to the $1,898,000,000 independent offices appropriation bill.

TVA requested the money to continue work on the Gilbertsville (Ky.) dam, to start construction on the Watts Bar dam on the Tennessee river, and to investigate a proposed dam site at Coulter Shoals in Tennessee.

Voting to restore the TVA funds were 174 Democrats, 6 Republicans, 2 Progressives, 1 Farmer-Laborite, and 1 American-Laborite. Thirty-three Democrats joined 142 Republicans in opposition.

President Encourages Utilities

PRESIDENT Roosevelt last month asserted at a press conference that business and industry should have no fear of new taxes, further Federal competition in the power field, or spending beyond budget needs.

His statements on domestic affairs included an invitation to budget critics to come to the White House, where he would welcome them and state specifically how the government's financial books could be taken out of the red without higher taxation or elimination of essential Federal functions.

When questioned on whether the administration contemplated any business appeasement moves he replied with a question of his own. He asked what there was to appease and called for specific reasons for what a reporter called fears on the part of business to branch out. The reporter said some power utilities were hesitant to go forward with expansion plans because of uncertainty over further government competition.

The President stated that this was a good illustration of how generalities are destroyed when considered in the light of the actual facts. He added that for a year and a half about 95 per cent of the utility people had known and accepted as fact that the government was not planning any further power developments.

With the exception of one or two concerns he said all companies during that period came under the Holding Company Act by registering with the Securities and Exchange Commission. Registration of Electric Bond and Share, he said, marked a virtually complete understanding between the government and the utilities that the former intended no more power programs. The constitutionality of the act had been accepted, he added, and virtually the entire industry was coöperating.

He said the utilities had no reason for not going ahead with expansion programs.

Transportation Cabinet Post Proposed

CREATION of a cabinet post for administration of transportation policies was proposed before the House Interstate Commerce Committee last month by the Railroad Security Owners' Association, represented by J. D. Shatford.

The cabinet post would be headed by a Secretary of Transportation and would be superior to the Interstate Commerce Commission and other governmental bodies engaged in administration laws dealing with transportation. The plan calls for curtailment of the powers of the ICC "to the extent that they enter the realm of management."

Mr. Shatford proposed revision of the rate-making policy "to more nearly equalize the cost and worth of service." The carriers, he said, should be permitted to make rates similar to the system of "agreed rates" now in operation in England, Canada, and Australia. Also, he said, Congress should approve the Pettengill long and short haul bill and abolish land grant rates.

Mr. Shatford suggested that rail wages be reduced "to a figure based upon 1929 rates in relation to carloadings and adjusted in the same manner semiannually." All subsidies to transportation agencies competing with the railroads should be abolished, he said.

The American Trucking Associations, Inc., last month expressed opposition to reorganization of the ICC, as proposed in a transportation bill sponsored by Representative Lea of California, chairman of the House Interstate Commerce Committee.

J. N. Beall, general counsel of the trucking organization, told the committee that instead of increasing the number of commissioners from 11 to 19, Congress should give the agency more authority over all carriers and a larger staff, with more examiners and inspectors.

If Congress hopes to place the transportation industry on a profitable basis, Mr. Beall declared, it must require carriers to charge rates that will insure a fair return on "prudent investment" above actual cost of performing service.

Chamber Urges Definite Purchase Rules

ESTABLISHMENT of definite rules and regulations covering government purchase of privately owned utilities, where purchases are designed to avoid destructive competition between public and private operators, was advocated by the national resources committee of the U. S. Chamber of Commerce recently.

Meantime, Dr. Hugh S. Magill, president of the American Federation of Investors, wrote all members of Congress urging them to take a determined stand against further extension of "destructive government competition with private industry."

The Chamber of Commerce committee took the position that a "fair price" to be paid by the government for competitive privately owned utilities should be determined "by disinterested parties, and their application and use should be required by law on a nation-wide, or, if more practicable, on a statewide basis." The chamber's proposal came a week after the TVA had completed negotiations for purchase of a part of the Commonwealth & Southern system adjacent to the Tennessee valley region.

The chamber also proposed that publicly owned and operated utilities be subject to the same regulation as applies to privately owned utility properties. The chamber said:

"Until there has been provided for publicly owned utilities the regulation which we urge, occasions will arise in which there will be no alternatives for privately owned utilities than sale of their properties to the only available buyer—the government. For such sales there should be formulated appropriate and fair rules, protecting the proper interest of both parties."

FPC Reports on Dams

THE Federal Power Commission on February 22nd reported that states and municipalities would have preference as licensees to develop power at flood control dams in New England.

The report, incorporated in a Senate document introduced by Senator Walsh, Democrat of Massachusetts, added that no Federal agency could develop hydroelectric power energy at such dams without enabling legislation by Congress. Summarizing numerous Supreme Court decisions of recent years on the controversial subject of government power development, the report continued:

"It is apparent that without any consent from a state, the Federal government can acquire all of the rights, title, and interest necessary to build and maintain dams for the purposes of flood control."

It added the government could, in conjunction with such flood control projects, carry out any incidental function, such as the generation and disposal of power, under the 1938 Flood Control Act. However, special legislation would have to be enacted, the report explained, to authorize such development.

For the government to obtain "exclusive jurisdiction" over property used for flood control, the report said the states must consent. This right of the states was an issue raised recently by Governor George D. Aiken of Vermont. Since then the states have been asked by the Federal government to modify their laws to give the government "exclusive" jurisdiction.

Senator Walsh, who has attempted to end the controversy between Federal and state officials over the flood control program for the Connecticut and Merrimack rivers, said he was confident the War Department and the states would reach an agreement on land acquisition.

Mexico Faces Power Famine

ELECTRIC power, expropriated oil, and domestic politics were reported discussed last month at one of President Lazaro Cardenas' infrequent meetings with his full cabinet. Despite drastic economies, Mexican power resources continue to dwindle, and despite optimistic hints from the government, the oil controversy was still far from a settlement, it was authoritatively declared.

Of the three subjects of discussion, the problem of conserving electric current was the most immediately important, it was said. Despite the government's action in advancing clocks an hour, curtailing street car service, and reducing the hours of operation in mines and factories, with threatened wage cuts and unemployment, electric consumption was still at a rate that threatened complete failure by the end of March or the beginning of April.

After the cabinet meeting it was learned that despite the drastic economies ordered by the government, which resulted in the saving of 50,000 kilowatt hours of electricity, further savings of 250,000 kilowatt hours were necessary if Mexico City was to escape complete failure of its light and power.

The daily consumption in Mexico City and in the states of Mexico, Hidalgo, and Morelos, which are affected by a shortage of water in the Necaxa and Tepuxtapec dams, is 3,300,000 kilowatt hours, and engineers declared that a 12 per cent reduction was essential.

It was reported that a large part of the cabinet session had been devoted to plans for augmenting the power reserves by tapping lines

from Veragruz, which run within 12 miles of the capital to the San Rafael Paper Company. One of the most important acts of the government power crisis was said to be the enactment of a law providing for fines up to 10,000 pesos for the theft of electric current.

Alabama

Tax Bill Held Up

GOVERNOR Dixon recently announced that a legislative recess committee would study the "general situation" regarding TVA and power distribution by Alabama municipalities before any action would be taken on the Booth bill to levy a tax of 1¼ mills per kilowatt hour on TVA power sold by municipal distribution systems.

The governor's announcement followed a long-distance telephone conversation with Senator Henry H. Booth, of Anniston, who introduced the bill in the state senate recently.

Also scheduled to be held up was a bill planned to be introduced by Representative J. M. Devers, of Scottsboro, to repay north Alabama counties in the TVA area for ad valorem tax losses resulting from the Federal authority acquiring large tracts of land and taking it off the tax rolls.

Senator Booth, who was urged to introduce his bill by the Citizens Educational Advisory Council, Anniston, as part of a general program for advancement of education in Alabama, had estimated about $100,000 a year would be collected by the state and counties under the measure and that $50,000 of this would go to the schools. Devers also had estimated more than $100,000 would be recovered for 9 north Alabama counties under his bill, which he had planned for early introduction.

Arizona

Pact Ratification Protested

GOVERNOR Jones and the state legislature had before them last month a strongly worded protest against Senate Bill 56, providing for conditional ratification of the Colorado river compact. The protest was submitted by Fred T. Colter, as president of the Arizona Highline Reclamation Association and the Glen-Bridge-Verde-Highline Pre-Organization Irrigation and Power District.

A separate communication of protest was submitted to J. Melvin Goodson, speaker of the house of representatives. The senate had adopted the bill, which was awaiting action by the house.

In pointing out Arizona has refused to sign a Santa Fe compact for eighteen years, Colter declared Senate Bill 56 also provides for the "crumbs" that are left in the lower basin (Arizona, Nevada, and California) in a tri-state compact, to be deeded to Mexico and California, leaving all surplus water to go to Mexico, being around 10,000,000 acre-feet.

Under the bill, he asserted Arizona was left with the obligation to guarantee Mexico's deficiency in dry years, thereby impairing the old and already completed projects throughout the state as well as all future projects and would eventually desolate Arizona. He declared the bill would be defeated in the courts if approved.

Arkansas

Purchase Measure Amended

HOUSE Bill No. 311 by Blakemore of Logan and Robinson of Lafayette, purpose of which is to give cities and towns authority to purchase, construct, or improve gas distribution and supply systems and to issue revenue bonds with which to finance such actions, was amended in the senate last month to provide that such bonds could not be sold for less than 100 cents on the dollar.

Senator Smith, opposing the amendment, said it would nullify the bill because no city could sell its bonds at par. An amendment also was adopted to strike from the bill a section exempting the proposed revenue bonds from all state, county, and municipal taxes.

Opponents of the bill had previously attached 9 amendments to the measure, one of which struck the words "natural gas" from the bill wherever it appeared. Mr. Smith warned his fellow members that the motive behind most of the amendments was to nullify the bill and the senate receded from its action in adopting them. All but two of the amendments were withdrawn or voted down.

Representatives Robinson and Blakemore said it was probable many distribution systems would be built under the Federal loan and grant policy if the bill were enacted into law

and the PWA program continued. Procedure for the purchase of gas distribution systems under their bill would be the same as that now used by cities purchasing water distribution systems.

Oil and Gas Bill Approved

HOUSE approval completed legislative action on February 14th on Governor Bailey's proposal to create a state oil and gas commission with broad regulatory powers, replacing the present 5-member state board of conservation. The house passed the bill, by Senator R. K. Mason of Camden, 72 to 9 after extended debate. It was sent to Governor Bailey.

The bill would provide for a 7-member commission, instead of the 5-man conservation board. Supporters of the measure argued it would give the force of law to regulations issued to enforce conservation of oil and gas resources of the state.

It would authorize levying of an assessment of 5 mills a barrel on oil and half a mill on 1,000 cubic feet of gas to provide funds for administration. A director of production and conservation could be employed at a salary of not more than $5,000 a year.

California

Gas Rate Cut Announced

RAY C. Wakefield, president of the state railroad commission, last month announced that rates of the Southern Counties Gas Company would be reduced $250,000 annually, effective as of March 1st. The announcement followed termination of an investigation of the utility's operations by members of the commission's staff and conferences with company executives and representatives of a number of the municipalities served. Wakefield stated:

"The major savings of this rate adjustment will be made to residential customers in San Pedro, Santa Monica, Ventura, and Santa Barbara. The rates of these districts have been higher than in other districts served by the company while the earnings in these areas likewise have been larger. The commission, therefore, believed it equitable that the largest part of the savings should be distributed in these areas."

Reductions in the rates of commercial and industrial users also have been made to consumers in eastern Los Angeles and Orange counties. In addition the wholesale rate under which the San Diego Consolidated Gas & Electric Company purchases gas from the Southern Counties Gas Company has been reduced so that San Diego domestic gas users will benefit to the extent of $32,000 annually.

This marked the sixth reduction in the rates of this company, aggregating $927,600 a year.

Utility Authority

ESTABLISHMENT of a California Utility Authority for the purpose of acquiring, constructing, maintaining, and operating water, light, and gas works, financed by the revenue bond method without necessity of holding elections for a vote of the people on such bond issuance, was provided for in a bill introduced in the state assembly by Democratic Assemblymen Yorty and Kilpatrick, Los Angeles county.

The utility authority would be composed of five members appointed by the governor for 4-year terms. The members would be paid a $5,000 annual salary, together with their actual necessary traveling expenses.

The authority would be given power to "acquire, construct, and maintain for and in the name of the state, gas works, electric works, and waterworks, at any place within the state, whenever in its opinion it is necessary or desirable to do so."

The authority, furthermore, would be given the power to fix rates and other charges for all public services rendered by it from any utility acquired or built by it. Condemnation of existing utility properties in any part of the state would be possible under the power given the utility authority.

The proposed bill appropriates $50,000 out of the state treasury to set up the proposed authority if the act becomes law.

Colorado

Million-Dollar Cut

THE Denver city council on February 27th passed a new rate ordinance, effective as of March 1st, which lowered electric rates for more than 75,000 consumers. The entire rate reduction amounted to approximately $1,052,000 a year for the city and between 17 and 18 per cent for the average individual consumer of electricity. Reduction in the electric rates resulted from negotiations which were undertaken early in January by city officials. Numerous conferences were held before city authorities and company executives came to an agreement on the rates.

The city council also passed a motion to

undertake immediate negotiations with the company for lower and more satisfactory rates for the owners of large restaurants which operate under an industrial rate.

Connecticut

Power Dam Supported

ARMY Engineers on February 16th completely reversed their findings in two earlier surveys and recommended the Federal government build a power dam at Enfield Rapids to permit channelization of the Connecticut river above Hartford. The recommendation appeared to have a good chance of winning House approval this session, it was said, but its fate in the Senate seemed less certain.

Existing legislation authorized a channel in the river at Federal expense, but specified the Enfield dam should be built by state, local, or private interests. The modification to permit Federal construction would be incorporated in a general rivers and harbors bill. Chairman Mansfield of the House Rivers and Harbors Committee was said to favor the change and would order hearings as soon as copies of the Army Engineers' report and recommendations became available.

Representative Clason, Republican of Massachusetts, on February 20th asked Army Engineers to determine the extent flood waters would be raised in the Connecticut by the construction of a 30-foot power dam at Enfield. In their report the engineers said flood waters would be raised slightly, but proposed raising levees and dikes on the upper river to offset the higher flood level. Clason said, however, towns unprotected by dikes or levees had protested that flood hazards in their areas would be increased.

Governor Baldwin last month announced the appointment of the State Flood Control Commission, authorized to negotiate for flood control and to study kindred matters and report to the general assembly by April 15th. The members are General Sanford H. Wadhams, chairman of the State Water Commission, James A. Newlands of Hartford, a sanitary engineer and a member of the former flood commission, Professor Charles R. Hoover of Wesleyan University, a chemical engineer and consultant of the State Water Commission, Ernest L. Averill, former deputy attorney general and a member of the Tri-State Pollution Commission, and Martin J. Gormley, New Haven attorney. It was expected one of the first tasks of the commission would be a survey of present flood control activity in the other New England states.

Georgia

Consumers Benefit

A REDUCTION in commercial electric rates of the Georgia Power Company, which will result in savings of approximately $190,000 annually for an estimated 20,000 consumers, effective March 1st, was announced last month by P. S. Arkwright, president of the Georgia Company.

The reduction was being made automatically as the result of operation of a promotional rate schedule put into effect in 1934. The so-called "immediate" rate for users of commercial lighting service will be wiped out and the lower "inducement" rate will be applied to all consumers in this class. Under the commercial rate schedules prescribed by the state public service commission in March, 1934, it was provided that the immediate rate should be eliminated at the end of a 5-year period and the inducement rate made available to all commercial lighting users.

Approximately 16,000 consumers have already earned the lower inducement rate through increased use of their electric service and would not be affected by the new rate schedule, according to the announcement. The principal classes of consumers affected by the rate reduction were stores, filling stations, boarding houses, churches, schools, and other public buildings, offices, and others using electricity primarily for lighting.

Indiana

Utility Rulings

TWO opinions related to city purchase of private utilities were handed down on February 21st by the state supreme court. The court upheld purchase of the Indiana Water Works Company plant at Greensburg by the city, as was approved by the state public serv-

ice commission. Several Greensburg residents sought to set aside the commission's order in the Decatur county circuit court, lost and appealed.

In an Aurora case where the question of buying utility properties was put to a city-wide vote, the court reversed the Dearborn county circuit court and held it was error that appraisers were appointed to condemn the properties. The properties were the light, water, and gas plants in the city owned by the Public Service Company of Indiana.

The high court ruled it was error that one question on the ballots covered purchase of all three utilities, giving voters no right to vote for purchase of one utility and against purchase of another.

The state house of representatives on the same day passed unanimously a bill revising the procedure by which Indianapolis might purchase the Indianapolis Water Company or any other utility, if such a step was deemed feasible.

Sponsored by the Indianapolis city administration, the measure provides that purchase of any utility must be approved by the city council, the mayor, and also the governing board of the utility district, which was created specifically for the purchase of what now is the Citizens Gas & Coke Utility.

Drafting of the bill by the city legal department grew out of recent agitation for acquisition of the water company by the city. City administration and civic leaders have taken the position that any such purchase should be surrounded by the protective provisions set up in the bill.

Utility Tax Bill Signed

GOVERNOR M. Clifford Townsend on February 23rd signed S. B. 52, which exempts from property taxes, real and personal, municipal utilities as well as all other municipally owned property. Containing an emergency clause, the measure became effective immediately.

The utility tax exemption bill, which provides that such property shall not be exempt from the gross income tax, was attacked by various persons as unwise legislation. They urged that the governor veto it on the ground that it would shift the tax obligation of one group to another—from the patrons to the general taxpayers.

Among other bills signed by the governor on the same day was a bill (S. B. 158) amending utility stock regulations. The bill adds new limitation on preferred stock and funded debt of a utility; rewrites purposes for which a public utility, with state public service commission approval, may issue stocks, certificates, bonds, notes, etc.; adds several new clauses concerning purchase (or sale) of plant, business, or property of (to) another utility with commission approval.

Kansas

Right of Eminent Domain Given

FINAL passage of the highly controversial eminent domain bill marked the brief session of the state senate on February 17th. The senate bill, sponsored by the committee on oil and gas, extends to gas companies the right to condemn used up underground gas wells.

Senator Skovgard, of Greenleaf, made a last effort to kill the bill but failed. It passed on roll call vote, 23 to 9, and was then sent to the house.

Skovgard charged that the measure was designed to force one landowner to give in, near Garnett, and amounted to a granting of special privileges by the legislature.

Michigan

Utility Ouster Affirmed

OUSTED members of the state public utilities commission on February 23rd lost their fight to save their jobs when Circuit Judge Leland W. Carr upheld the authority of the state legislature to abolish the commission and set up the Michigan Public Service Commission as an emergency act. The court dismissed their plea for a permanent injunction to restrain newly appointed commissioners from taking up their duties.

Paul H. Todd, of Kalamazoo, chairman of the abolished commission, on February 24th asked the state supreme court for a stay of Judge Carr's decision. James A. Greene, chief assistant attorney general, had previously declared that the public service commission members would not attempt to operate pending a supreme court decision.

Todd, at odds with Governor Fitzgerald, had contended that his ouster, brought about through the abolishment of one commission and the creation of another, was for "political reasons" and could not be made effective until ninety days after the close of the legislative session. The state legislature had voted "immediate effect."

Judge Carr, holding that the "immediate effect" principle was the only legal question

involved, pointed out that "in no case has the action of the legislature in giving immediate effect to a statute been found in violation of the Constitution."

Fighting the ouster with Todd was Commissioner Joseph M. Donnelly. The resignations of Commissioners Howell Van Auken and Charles S. Porritt were accepted by the governor. Commissioner Frank G. Schemanske had never been confirmed by the senate, and could be removed at the governor's pleasure.

Governor Fitzgerald replaced them, in organizing the newly created public service commission, with John J. O'Hara, Gilbert T. Shilson, Ivan Hull, Don McIntyre, and Florence M. Kiely.

Nebraska

Subsidy Offered Utility District

A 6-mill subsidy per kilowatt hour of electricity produced by the municipal plants of Ord and Burwell and consumed in the two cities in the next year was offered to the North Loup Public Power and Irrigation District recently by a power committee representing the two municipalities. Former purchasers of power from the district, the municipalities had repudiated their contract.

The committee in a 5-year contract offered a 5-mill subsidy for the second year, 4 mills for the third, and 3 for the fourth and fifth, after the district pointed out increased revenue from irrigation was anticipated. The 6-mill subsidy, members of the committee said, would net the district $13,000 on the basis of last year's power consumption.

Previously the municipalities had offered the district a flat 4 mills per year subsidy on a 5-year contract. The new offer, municipal committee men said, was their reply to a statement by K. Sewell Wingfield, PWA project engineer for Nebraska, that the district faces receivership unless it can pay its own way.

North Carolina

Duke Offer Rejected

A PROPOSITION by which the city of High Point would discontinue plans for the erection of a $6,500,000 hydroelectric plant on the Yadkin river in exchange for certain grants by the Duke Power Company was rejected by the city council last month.

City Manager E. M. Knox said that on February 4th the city received a proposal under the signature of E. C. Marshall of Charlotte, vice president of the power company, whereby if High Point abandoned its power project, Duke, among other things, would turn over to the city certain customers who used 9,250,000 kilowatt hours of current in 1938 and produced a gross revenue of $150,000. The power concern estimated that this would give the city total electric current requirements for resale of about 22,000,000 kilowatt hours.

Under the proposal, Duke would sell the city lines, transformers, meters, and other equipment to permit the serving of additional customers in the sum of $200,000, for payment of which the company would accept the city's 4 per cent electric revenue bonds.

The company also would confine its business for the next thirty years and would make a satisfactory settlement of a suit for alleged overcharges, started by the city.

Pennsylvania

Favors Federal Flood Control

GOVERNOR James recently expressed himself as favoring Federal flood control projects in Pennsylvania, provided the state received assurances "in black and white" that the Federal government would not take over the state's water power and other natural resources.

After conferring with a group of flood control advocates from western Pennsylvania, Governor James said:

"Generally speaking, I am in accord with the purpose and plan of the proposal in the memorandum submitted to me. All I want to be sure of is that in attempting to solve the question of flood control we are not losing our water power control. As governor of Pennsylvania I must remember that in the western part of the state there are vast deposits of coal and in the eastern part of the state there are vast deposits of coal and that their usefulness and potentialities must be preserved."

Informed by representatives of the Tri-State Authority and the Pittsburgh Chamber of Commerce Flood Control Committee that U. S. Army Engineers in charge of Federal flood control work had told them no water

power rights were involved in the dams now being constructed in western Pennsylvania, Governor James replied that he "would like to have it in black and white."

FPC Queries Merger

THE Federal Power Commission last month ordered a hearing on April 3rd on the joint application of the Metropolitan Edison Company and the Northern Pennsylvania Power Company for approval of the merger of the latter company with the former. Conditional approval of the merger was granted by the commission on November 20, 1936.

The new order suspended the effect of the old one and stated:

"The decision of the superior court of the commonwealth of Pennsylvania entered on July 15, 1938, clearly indicates that the terms and conditions upon which the applicant companies are seeking approval of the disposition and sale of their respective franchises and properties before the Pennsylvania Public Utility Commission are materially different from the terms and conditions submitted to the Federal Power Commission at the time of the granting of its prior conditional approval, and distinctly at variance with the terms and conditions set forth in the new agreement bearing date of July 14, 1938, submitted as a part of the response of these companies in their return to the show cause order issued by this commission on May 24, 1938."

The order issued on May 24, 1938, required the companies to show cause by July 15, 1938, why the order granting conditional approval should not be annulled and was adopted after the companies failed to file agreements complying with the conditions imposed by the 1936 order granting conditional approval of the merger.

Utility Act May Be Amended

REPUBLICAN legislators recently indicated a strong possibility that drastic amendments would be inserted in the 1937 Public Utility Act, which made substantial savings for consumers during the first year and a half of its operation.

Speaker Ellwood J. Turner revealed that the act was assailed before a special joint committee of Republican legislators on three counts:

1. That the temporary rate provision, most important feature of the law, has resulted in some cases in depriving the companies of revenue while raising the bills paid by some of the customers.

2. That the utility commission, in its investigation of the natural gas industry, handed down a "blanket indictment" of all natural gas companies without discrimination.

3. That the commission's powers to impose costs on the utilities are too broad in that the companies are often assessed heavily "without getting anything for it."

It was understood that several Republican senators and representatives have declared themselves as unalterably opposed to either "packing" the body or ripping it out. Consensus was that party leaders feel such a move would be politically dangerous.

Tennessee

Power Bill Passed

NASHVILLE'S $20,000,000 electric system bill received house approval on February 17th. The measure, amended at the suggestion of TVA authorities before it was given final approval in the senate on February 13th, passed the house without opposition and was signed by the governor.

Mayor Thomas L. Cummings subsequently appointed members of the power board, of which J. D. Goodpasture is chairman. By the terms of the Power Board Act Mr. Goodpasture, appointed for a 12-year term, automatically became chairman for the next four years. The 5-man commission was confirmed by the city council in regular session.

The act provides that each member of the board shall be bonded in the amount of $25,000. The salary of the chairman is $3,000 annually; the vice-chairman, $900, and other members, $600 yearly.

The board has authority to stipulate the types of bonds to be issued, provided that not more than $12,000,000 of the $20,000,000 limit shall be direct obligation bonds of the city of Nashville.

Under a provision added at the suggestion of TVA, the mayor will also have power to name all succeeding members to the board. Under the terms of the bill as amended the city council has no veto power over any action of the power board.

Utility Tax Urged

A GROSS receipts tax of 3 per cent on publicly owned utilities in Tennessee, to be levied only so long as needed to replace revenue lost by sale of private power properties, was introduced in the state house of representatives on February 22nd by administration leaders.

A companion bill would require public power bodies to pay to the state and counties the equivalent of property taxes which have been paid by the private utilities.

Introduction of the two bills was preceded by a joint resolution, also under administration sponsorship, declaring that the proposed gross receipts tax "is designed only as a tem-

porary expedient for the purpose of replacing a revenue loss and is intended to continue only until the tax replacement can be secured by contributions from public power or governmental agencies and not thereafter."

The utility tax resolution had the full endorsement of the administration forces but met with the disapproval of E. H. Crump, the Shelby leader, who favors a liquor tax. The house on February 23rd tabled the resolution.

Texas

Commission Measure Killed

THE house committee on municipal and private corporations dealt a blow to public utility regulation bills last month by voting 16 to 2 against a commission measure of Bryan Bradbury.

The vote of the committee killed the bill, as at least four dissenters were necessary to sign a minority report and thus bring it to the floor for a test. Although the bill is dead for the session, Bradbury said he would introduce another in a slightly different form in order to escape a rules ban and committee consideration of it.

The action of the house committee did not affect the utility bill which Olan Van Zandt had offered in the senate, but was said to have the effect of strengthening the apathy which existed toward the project.

Washington

Attends Utility Hearing

GOVERNOR Martin last month sat in on a continued hearing of the senate public utilities committee on the four controversial public utilities district bills. The hearing was held behind closed doors in the executive offices. Senator Joseph Drumheller, Democrat of Spokane, committee chairman, said the governor wished to hear both sides of the dispute. He later stated:

"It looks to me like it will be impossible to get out any legislation on which the legislature will be able to agree this session. It is a matter of conflict between two opposing forces moved by self-interest. There probably is some correct middle ground which we will have to reach."

Grange leaders and public utilities district commissioners have opposed Senate Bill 230, requiring an election before utility district commissioners could purchase private facilities or issue bonds. The bill was sponsored by the Washington Taxpayers' League.

The granges and district commissioners have supported three other bills, S. B. 198, S. B. 199, and S. B. 200, clarifying the public utility district commissioners' power to issue revenue bonds and authorizing establishment of a state public utilities district authority.

Wisconsin

Assembly Votes WDA Death

THE Republican-Democratic coalition in the state assembly voted, 53 to 41, on February 23rd to kill the Wisconsin Development Authority Act, the power program of former Governor La Follette.

Assemblyman Andrew Biemiller, Progressive of Milwaukee, declared WDA had forced private utilities to cut rates and improve their service, and had made "an excellent record" in its brief history. He said:

"On this roll call there is the clear cut issue —do you want the people of Wisconsin to have an agency to combat the power trust or do you want their dollars to go to Wall Street?"

Speaker Vernon Thomson, Republican of Richland Center, declared that when WDA was proposed two years ago, "they went into the rural areas and drummed around the bushes to get some farmers to say they wanted the WDA." He asserted that after WDA is wiped out, an appropriation would be made by the state to set up a coördinating office to carry on educational work for rural electrification. He charged WDA's fault was that it contemplated activities in addition to rural electrification.

Thomson maintained that it was time the state of Wisconsin took the state government out of political propaganda and let the rural coöperatives develop under their own motion.

Biemiller twitted Thomson and other Republicans on the offer of an appropriation for educational work on rural electrification.

Farm Republicans and a few Democrats joined Progressives in voting against abolition of the power program.

The Latest Utility Rulings

State Commission Assumes Jurisdiction Over Interstate Gas Company

THE Interstate Natural Gas Company, Inc., was ordered by the Louisiana commission to give the commission and its representatives access to its property, books, and records for the purpose of determining fair and reasonable rates and charges for gas transported or sold in intrastate commerce in Louisiana.

The company had denied jurisdiction of the commission on three grounds: (1) that the company was not a common carrier pipe line, (2) that it was not a public utility, and (3) that a preponderance of the gas sold by it was sold in and as a part of its interstate commerce.

The commission did not consider it important whether the company was a common carrier pipe line. It was said that more important was the question whether the company was legally a public utility, since, if it was a public utility, it was subject to the jurisdiction of the commission under the state Constitution.

The company relied on various considerations in denying a public utility status. It asserted that its articles of incorporation provided for supplying gas under contract without operation as a public utility. It further asserted that it had never sought or exercised the power of eminent domain and did not hold itself out as ready to transport or sell natural gas to the public, and that while selling gas at wholesale to distributing agencies, it in no manner exercised any control or influence over any of its customers. The commission said:

> These assertions are not conclusive as to the question whether this company is or is not a public utility. Its statements in its articles of incorporation, particularly when the act of incorporation occurred in another state, are not proof of the actual character of its business in Louisiana. Although the exercise of eminent domain by this company might well be conclusive that it is a public utility, its avoidance of the exercise of such power is by no means conclusive that it is not a public utility. It merely proves that it has been able to conduct business without the use of eminent domain. . . .
>
> The fundamental and vital point as to whether this company is a public utility lies in the nature of the business which it does, and particularly as to the importance of its business to the public, linked with its inherently monopolistic character.

The supplying of natural gas by a pipeline company to local distributors, said the commission, is as essential a public utility service as the distribution itself. The commission referred to the fact that the company was subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, and stated that if transportation and sale of natural gas in interstate commerce by this company was so affected with a public interest as to bring it under regulation of a Federal agency, the transportation and sale of the gas in intrastate commerce in Louisiana were similarly so affected with a public interest as to subject it to regulation by the state commission.

Claims that the company was exempt by reason of its interstate business were also overruled. The commission said that a part of the business was purely intrastate, another part purely interstate, while the remaining involved the crossing of state lines, either before or after sale. The major part of the business was said to be in Louisiana and of great concern to the commission. *Louisiana Public Service Commission v. Interstate Natural Gas Co., Inc. (No. 2720, Order No. 2090).*

Penalty Waiver and Other Practices Held to Be Discriminatory

THE Tennessee utilities commission has decided to instruct a district attorney to prosecute an electric utility company in that state for alleged discriminatory practices. This action came after the commission had ordered the Tennessee Electric Power Company to show cause why information as to the alleged violation should not be turned over to the district attorney. The utility company took the position that charges as alleged did not amount to unlawful discrimination.

The commission first decided that the collection or waiver of a discount or a penalty is not a purely managerial question over which the commission lacks authority in the absence of a general rule on the subject by the commission. The commission took the position that regulatory authority extends over discounts and penalties and that unlawful discrimination exists when a company over a long period fails to collect gross rates from certain delinquent customers as required by filed rate schedules.

The commission also held that unlawful discrimination existed because the company had over a long period extended long and unusual terms of credit to certain customers. It was said that the company at any time could have relied upon the privilege of discontinuing service expressly set up in its tariffs if it had chosen to do so. Yet it had permitted these bills to accrue for a period of approximately fifteen months. The commission declared:

> We have reached the conclusion that it is not the the law in Tennessee that utilities may engage in credit arrangements with their customers varying in such a wide disparity as to give certain favored customers extensions of month after month and running into years, while requiring others to pay promptly on pain of having their service discontinued after a month of delinquency. This is not the law now in Tennessee, and we do not believe it ever was the law.

Another complaint was that the electric company had paid excessive rates to a newspaper customer for advertising space. The commission found that the disparity in amounts paid to the newspaper for advertising was so great as to constitute a rebate, unlawfully discriminatory. The commission averred that the method of the power company in allowing itself to be overcharged for advertising space was but a device through which preferential rebates were bestowed upon the newspaper.

The final charge of discrimination was based upon payments by the power company to an attorney for the newspaper and a store company under common ownership. It was charged that no actual legal services were rendered in return for the payments, but that the attorney used the money to buy stock of the newspaper company. The commission determined that the amount paid for legal services was not commensurate with the services rendered and was not actually earned as an attorney fee. It was said that the record established the clear presumption that the payments were intended as a disguised subsidy to the newspaper. *Re Tennessee Electric Power Co. (Docket No. 2225).*

Exchange of Electric Company's Properties Approved

THE New York commission consented conditionally to the transfer and sale by petitioner to an electric light company of certain electric distribution lines and the transfer and sale by the latter company to petitioner of an electric transmission and two distribution lines.

Each company had invaded the franchise territory of the other by extending distribution lines from its own franchise territory across the border line into the franchise territory of the other company.

Both companies desired to end this unauthorized operation and sought to sell and transfer to each other the property each owned in the other's franchise territory. As to this the commission said:

> The present unauthorized operation by these companies was originally entered into as a convenience to and at the request of consumers. Unauthorized operation should cease and it is in the public interest that these companies acquire the distribution lines in their own franchise territory and get rid of distribution lines owned by them in territory for which they have no franchise.

The proposed purchase price in each case exceeded the depreciated book cost, and if approved it would have been necessary to charge the difference against surplus. The commission said that it cannot approve a transfer and order any part of the purchase price charged to surplus, since it can only approve or disapprove the purchase price set forth in the petition. Therefore, the commission recommended that the companies stipulate that the purchase price in each case shall be the depreciated original cost determined in property records when completed and approved by the commission. This condition qualified the consent granted by the commission. *Re Central New York Power Corp. (Case No. 9589).*

Utility Must Prove That Increased Rates Will Increase Profits

HIGHER gas rates for service to domestic customers were disapproved by the Massachusetts Department of Public Utilities on the ground that the company had failed to establish that the proposed rates would result in an increased revenue to the company or benefit to the public. It was said that the burden of proof was on the company to establish that the increase would result in greater profit.

The community served is an industrial area suffering severely from unemployment. The department observed that ordinarily the reason justifying rate increases is to meet rising costs in production and distribution, but here it might be fairly inferred that the principal cause and chief factor for the falling off in profits might be largely attributed to severe competition by much lower-cost, unregulated fuels, such as coal, coke, and range oil, which has resulted in a decrease in the average yearly gas consumption. Many customers, it was said, use both gas and such lower-cost fuels. The adverse economic conditions affecting the earning powers of the customers of this locality had required the wage earner to curtail his living expenses. The department continued:

> Under these circumstances it is difficult to comprehend how competition, mostly responsible for the lessening of the profits of the company, can be successfully overcome in Haverhill by further increases in rates, which action on part of the company may be used by competitors for psychological effect.

The department was of the opinion that the amount that the company estimated that it would benefit by the proposed increased rates would be more than offset by the disadvantages, loss in business and in good will.

Commissioner Grant, in a dissenting opinion, argued that the department had no right to trespass upon or interfere with the right of another public utility to exercise its honest discretion, and that while it was the concern of the department to see that rates are not increased to the point where they become intolerably burdensome to the community or exceed the fair value of the service rendered, there is likewise an inescapable obligation so to regulate rates that the character and quality of the service may be maintained.

In the dissenting opinion reference was made to the fact that a gas company "is no longer a public utility" in the broadest prospective because of its competitive condition. It must compete with the producers and distributors of coal, oil, coke,

and electricity, all save the last named of which may sell their commodities at whatever price they see fit. Reference was also made to the fact that the small user is usually a person of at least average means, such as the apartment type dweller, who does not maintain large families and does not have the necessity for extensive cooking facilities. *Re Haverhill Gas Light Co. (D.P.U. 5688).*

Massachusetts Trust Allowed to Hold Controlling Interest in Utilities

A COMMON stockholder in a Massachusetts trust sought to compel the department of public utilities to deal further with his complaint concerning a contract between that trust and another. The matter came before the supreme judicial court of Massachusetts (1) by petition for review in equity, and (2) by petition for a writ of mandamus. Both petitions were dismissed on the ground that the statute upon which the action was based did not apply to the particular contract in question.

The contract was one by which the trust was to acquire from another Massachusetts trust and a foreign corporation a minority stock interest in various gas and electric companies in which it already had the majority interest, in return for a majority stock interest in another gas and electric utility and a sum of money. The petitioner claimed that the consideration passing to the company in which he had an interest was inadequate and that the transaction would affect adversely the operations of all gas and electric companies affiliated with it as well as the rates of such companies.

The court said that no statute prevents the Massachusetts trust from holding a majority of the stock of a gas or electric company, and thereby controlling it. Therefore, the contract complained of, it was said, was not invalid upon its face for giving to one trust an increased majority ownership in and control of gas and electric companies located in Massachusetts, or for giving a similar majority ownership in and control of such companies to the other trust.

The court also said that a common stockholder in a Massachusetts trust could not maintain in supreme judicial court a petition for writ of mandamus to compel the department of public utilities to consider such a complaint since, even if the department had the power to act, it had discretion to remain inactive. *Flynn v. Commissioner of Department of Public Utilities, 18 N. E. (2d) 538.*

Tariffs for Service over Unauthorized Line Rejected

THE Missouri commission required a telephone company to withdraw a schedule of rates which it had proposed to apply to toll service between certain towns. One of the main objections to this proposed tariff was that the toll line to which such rates were to be applied had been constructed in violation of the statutes of the state, in that the builders had not secured a certificate of convenience and necessity for its construction.

The commission said that if the applicant had not secured authority to operate in a given territory, the commission had no power to authorize it to file schedules or rates that would be applicable to the service it proposed to render. Evidence was produced to show that public convenience and necessity required the construction of this toll line, that the rates filed were not greater than those filed by the protestant, and that protestant's service had been inadequate. The commission believed that these were not issues properly before it at this time. *Re Doniphan Telephone Co. (Case No. 9649).*

Railroad Required to Maintain Switch Tracks

THE Supreme Court of the United States held that the fact that a railroad does not own the land upon which an industrial switch track (constructed by the industry served but maintained by the railroad) is laid, does not render unconstitutional a commission's order denying the railroad's application for authority to discontinue and requiring it to maintain and operate the switch track. This ruling rested on the proposition that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Moreover, the railroad failed to allege that operating expenses would exceed revenue derived from use of the track or that operation of the track would not yield a reasonable profit, and it did not claim, as of constitutional right, to be entitled to have any profit from use of the switch track separately considered. *Alton Railroad Co. v. Illinois Commerce Commission (No. 231).*

Federal Court Refuses to Interfere in Rate Case

A FEDERAL circuit court of appeals set aside an order of the district court restraining the enforcement of a city ordinance reducing rates for natural gas on the sole ground that an appeal to the Texas Railroad Commission provided by statute had not been taken before applying for an injunction.

The city was empowered both by its charter and by statute to prescribe gas rates. Appeal from such an order may be had before the commission, which body shall hear the appeal *de novo.* An ordinance was passed reducing the rates without notice or hearing. The district court had granted an injunction on the ground that such rates were confiscatory.

The circuit court of appeals, in agreeing that the ordinance had not been lawfully passed, made the statement which is quoted below:

> Section 41 of the charter authorizes the fixing of rates by the city "provided such rates shall be reasonable and shall be fixed after giving such company an opportunity to be heard and shall not be a confiscation of the property of such company." Article 1175, being later general legislation applicable to many cities, gives power to fix rates without any such proviso. We find no such inconsistency between the two as to repeal the proviso of §41 by implication. It may stand consistently with Art. 1175, for the Constitutions of Texas and of the United States require about what the proviso does. It cannot be supposed that the legislature intended in enacting 1175 to do away with these requirements entirely nor as expressed in the charter of El Paso. The ordinance as passed, we agree with the district court, was not lawfully passed, and cannot lawfully be enforced.

The court said that the Johnson Act, limiting the jurisdiction of the district court in enjoining state rates, does not apply in cases where reasonable notice and hearing are not afforded in fixing the rate. However, that statute does emphasize the increasing disinclination of Federal authority to interfere in state matters until state remedies have been exhausted.

It was said that while it is the duty of Federal courts to uphold the Constitution of the United States, if state action is involved and the action thus far taken is not final but may be fully and readily reviewed administratively and redress afforded by the state itself, Federal authority ought to stand aside until the state's authority has finally spoken. Therefore, the court said, the district court should have refrained from exercising the power of injunction. *City of El Paso et al. v. Texas Cities Gas Co.*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

PREPRINTED FROM

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 27 P.U.R.(N.S.) NUMBER 1

Points of Special Interest

Titles and Index

TITLES

INDEX

PUBLIC UTILITIES REPORTS

UNITED STATES SUPREME COURT

Tennessee Electric Power Company et al.

v.

Tennessee Valley Authority et al.

[No. 27.]

(— U. S. —, 83 L. ed. —, 59 S. Ct. 366.)

Parties, § 7 — Complainants — Invasion of legal rights — Validity of statute.

1. The doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent, is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege, p. 5.

Parties, § 9 — Complainants — Utilities threatened with competition.

2. Electric utility companies whose charters and local franchises do not involve the grant of a monopoly or render competition illegal have no standing to contest the right of a power authority created by Federal statute to sell power to municipal plants, membership corporations, and industrial plants, resulting in competition with the electric companies, p. 5.

Monopoly and competition, § 23 — Monopolistic rights — Charters.

3. The franchise to exist as a corporation and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field, p. 5.

Monopoly and competition, § 23 — Monopolistic rights — Franchises.

4. Local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise, p. 5.

Monopoly and competition, § 23 — Monopolistic rights — Lawful competition.

5. The damage consequent on competition, otherwise lawful, is damnum absque injuria and will not support a cause of action or a right to sue, p. 6.

Injunction, § 36 — Unauthorized competition — Rights under certificates.

6. Electric utility companies operating under statutes requiring public utilities to obtain a certificate of convenience and necessity as a condition of doing business have no standing to maintain a suit to restrain operations of a Federal power authority which lacks such certificates when the states do not require certificates for operation by the Federal authority, p. 6.

Monopoly and competition, § 7 — Powers of state — Policy.

7. Whether competition between utilities shall be prohibited, regulated, or forbidden is a matter of state policy, and this policy is subject to alteration at the will of the legislature; and the declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in it, p. 6.

Constitutional law, § 3 — Right to raise question — Forbidden discrimination.

8. Electric utility companies subject to state regulation may not raise any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption of a Federal power authority from Commission regulation, p. 8.

United States, § 12 — Federal Power Authority — Contracts with municipality — Regulation or competition.

9. A Federal power authority, stipulating in its contracts with municipalities and nonprofit corporations purchasing power respecting the price at which the energy supplied shall be resold by its vendees, does not regulate the business of electric utilities with which the vendees contract, since this is nothing more than an incident of competition; it is but a method of seeking and assuring a market for the power which the authority has for sale and a lawful means to that end, p. 8.

Monopoly and competition, § 79.2 — Sales by power authority.

10. The sale of electricity by a Federal power authority in competition with other power is not a violation of the Tenth Amendment of the Federal Constitution, reserving regulation of purely local matters to the states or the people, p. 8.

Constitutional law, § 3 — Right to raise question — Electric utilities — Absence of states or their officers — Tenth Amendment.

11. Electric utility companies have no standing, in a suit to restrain the activities of a Federal power authority, to raise any question under the Tenth Amendment of the Federal Constitution, reserving regulation of local matters to the states or the people, when there is no objection to the operations by the state and the states or their officers are not parties to the suit, p. 8.

Appeal and review, § 25 — Discretion of lower court — Taking of deposition.

12. Permission to take a deposition of a Federal officer in a suit by power companies to restrain operations of a Federal power authority was held to be a matter within the discretion of the trial court in view of the prior opportunity to take this deposition, the lateness of the application, and other factors, p. 10.

Monopoly and competition, § 78 — Conspiracy to injure business — Coöperation by public officials.

13. Coöperation by two Federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with electric power companies, does not spell conspiracy to injure their business, and such coöperation does not involve unlawful concert, plan, or design, or coöperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute, p. 10.

(BUTLER and MCREYNOLDS, JJ., dissent.)

[January 30, 1939.]

APPEAL *from decree of United States District Court for the Eastern District of Tennessee dismissing bill by electric power corporations to restrain activities of a Federal power authority; decree affirmed. For lower court decision, see 24 P.U.R.(N.S.) 497.*

APPEARANCES: Raymond T. Jackson, of Cleveland, Ohio, and John C. Weadock, of New York City, argued the cause for appellants; John Lord O'Brian, of Buffalo, New York, and James Lawrence Fly, of Knoxville, Tennessee, argued the cause for appellees.

Mr. Justice ROBERTS delivered the opinion of the court: The Tennessee Valley Authority Act[1] erects a corporation, an instrumentality of the United States, to develop by a series of dams on the Tennessee river and its tributaries a system of navigation and flood control and to sell the power created by the dams. Eighteen corporations which generate and distribute electricity in Tennessee, Kentucky, Mississippi, Alabama, Georgia, West Virginia, Virginia, North Carolina, and South Carolina, and one which transmits electricity in Tennessee and Alabama, filed a bill in equity, in the chancery court of Knox county, Tennessee, against the Authority and its three executive officers and directors. The prayers were that the defendants be restrained from generating electricity out of water power created, or to be created, pursuant to the act and the Authority's plan of construction and operation; from transmitting, distributing, supplying, or selling electricity so generated, or to be generated, in competition with any of the complainants; from constructing, or financing the construction of, steam or hydroelectric generating stations, transmission lines or means of distribution, which will duplicate or compete with any of their services; from regulating their retail rates through any contract, scheme or device; and from substituting Federal regulation for state regulation of local rates for electric service, more especially by incorporating in contracts for the sale of electricity terms fixing retail rates. The defend-

[1] Act of May 18, 1933, 48 Stat. at L. 58, Chap. 32, as amended by Act of August 31, 1935, 49 Stat. at L. 1075, Chap. 836, 16 USCA §§ 831 et seq.

ants removed the cause to the United States district court for eastern Tennessee and there answered the bill. As required by the Act of August 24, 1937,[2] a court of three judges was convened which, after a trial, dismissed the bill.[3]

Fourteen of the complainants are here as appellants.[4] They contend that water power cannot constitutionally be created in conformity to the terms of the Tennessee Valley Authority Act, and the United States will, therefore, acquire no title to it, because it will not be produced as an incident of the exercise of the Federal power to improve navigation and control floods in the navigable waters of the nation. They affirm that the statutory plan is a plain attempt, in the guise of exerting granted powers, to exercise a power not granted to the United States, namely, the generation and sale of electric energy; that the execution of the plan contravenes the Fifth, Ninth, and Tenth Amendments of the Constitution, since the sale of electricity on the scale proposed will deprive the appellants of their property without due process of law, will result in Federal regulation of the internal affairs of the states, and will deprive the people of the states of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation. The appellees contest these contentions. For reasons about to be stated we do not consider or decide the issues thus mooted.

The Authority's acts, which the appellants claim give rise to a cause of action, comprise (1) the sale of electric energy at wholesale to municipalities empowered by state law to maintain and operate their own distribution systems; (2) the sale of such energy at wholesale to membership corporations organized under state law to purchase and distribute electricity to their members without profit; (3) the sale of firm and secondary power at wholesale to industrial plants.

The appellants are incorporated for the purpose and with the authority to conduct business as public utilities. Several do so only within the states of their incorporation; those chartered elsewhere have qualified as foreign corporations under the laws of the states in which they manufacture, transmit, or distribute electricity. Most of them have local franchises, licenses, or easements granted by municipalities or governmental subdivisions but it is admitted that none of these franchises confers an exclusive privilege.

While the Authority has not built or authorized any transmission line, has not sold or authorized the sale of electricity, or contracted for, or authorized any contract for, the sale of electricity by others, in territory served by nine of the appellants, it has done some or all of these things in areas served or susceptible of service by five of the companies; and it plans to enter in the same way the territory of other appellants. It is, clear, therefore, that its

[2] 50 Stat. at L. 751, 752, Chap. 754, 28 USCA § 380a.

[3] (1938) 21 F. Supp. 947, 24 P.U.R.(N.S) 497.

[4] Georgia Power Company was enjoined from maintaining the action. See Georgia Power Co. v. Tennessee Valley Authority (1937) 17 F. Supp. 769; Re Georgia Power Co. (1937) 89 F. (2d) 218, 21 P.U.R.(N.S.) 659; (1937) 302 U. S. 692, 82 L. ed. 535, 58 S. Ct. 11. Four other complainants have since been permitted to withdraw from the litigation without prejudice to its prosecution by the remaining appellants.

acts have resulted and will result in the establishment of municipal and coöperative distribution systems competing with those of some or all the appellants in territory which they now serve, or reasonably expect to serve by extension of their existing systems, and in direct competition with the appellants' enterprises through the sale of power to industries in areas now served by them or which they can serve by expansion of their facilities. The appellants assert that this competition will inflict substantial damage upon them. The appellees admit that such damage will result, but contend that it is not the basis of a cause of action since it is damnum absque injuria,—a damage not consequent upon the violation of any right recognized by law.

[1] The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent.[5] The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.[6] The appellants urge that the Tennessee Valley Authority, by competing with them in the sale of electric energy, is destroying their property and rights without warrant, since the claimed authorization of its transactions is an unconstitutional statute. The pith of the complaint is the Authority's competition. But the appellants realize that competition between natural persons is lawful. They seek to stigmatize the Authority's present and proposed competition as "illegal" by reliance on their franchises which they say are property protected from injury or destruction by competition. They classify the franchises in question as of two sorts,—those involved in the state's grant of incorporation or of domestication and those arising from the grant by the state or its subdivisions of the privilege to use and occupy public property and public places for the service of the public.

[2–4] The charters of the companies which operate in the states of their incorporation give them legal existence and power to function as public utilities. The like existence and powers of those chartered in other states have been recognized by the laws of the states in which they do business permitting the domestication of foreign corporations. The appellants say

[5] Philadelphia Co. v. Stimson (1912) 223 U. S. 605, 619, 56 L. ed. 570, 576, 32 S. Ct. 340; Stafford v. Wallace (1922) 258 U. S. 495, 512, 66 L. ed. 735, 740, 42 S. Ct. 397, 23 A.L.R. 229; Massachusetts v. Mellon (1923) 262 U. S. 447, 488, 67 L. ed. 1078, 1085, 43 S. Ct. 597. The same rule applies to suits against state officers: Osborn v. Bank of United States (1824) 9 Wheat. 738, 857, 6 L. ed. 204, 232; Terrace v. Thompson (1923) 263 U. S. 197, 214, 68 L. ed. 255, 273, 44 S. Ct. 15; Sterling v. Constantin (1932) 287 U. S. 378, 393, 77 L. ed. 375, 382, 53 S. Ct. 190.

[6] Re Ayers (1887) 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Walla Walla v. Walla Walla Water Co. (1898) 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77; American School of Magnetic Healing v. McAnnulty (1902) 187 U. S. 94, 47 L. ed. 90, 23 S. Ct. 33; Ex parte Young (1908) 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764; Scully v. Bird (1908) 209 U. S. 481, 52 L. ed. 899, 28 S. Ct. 597; Philadelphia Co. v. Stimson, *supra;* Lane v. Watts (1914) 234 U. S. 525, 58 L. ed. 1440, 34 S. Ct. 965; Truax v. Raich (1915) 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Lipke v. Lederer (1922) 259 U. S. 557, 66 L. ed. 1061, 42 S. Ct. 549.

that the franchise to be a public utility corporation and to function as such, with incidental powers, is a species of property which is directly taken or injured by the Authority's competition. They further urge that, though nonexclusive, the local franchises or easements, which grant them the privilege to serve within given municipal subdivisions, and to occupy streets and public places, are also property which the Authority is destroying by its competition. Since what is being done is justified by reference to the Tennessee Valley Authority Act, they say they have standing to challenge its constitutionality.

The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition,[7] and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field.[8] The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise.[9] The grantor may preclude itself by contract from initiating or permitting such competition,[10] but no such contractual obligation is here asserted.

[5] The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue.[11]

[6,7] Certain provisions of state

[7] See Charles River Bridge v. Warren Bridge (1837) 11 Pet. 420, 548, 9 L. ed. 773, 824; Washington & B. Turnp. Co. v. Maryland (1865) 3 Wall. 210, 213, 18 L. ed. 180, 182; Hamilton Gaslight & Coke Co. v. Hamilton (1892) 146 U. S. 258, 268, 36 L. ed. 963, 968, 13 S. Ct. 90; Pearsall v. Great Northern R. Co. (1896) 161 U. S. 646, 664, 40 L. ed. 838, 844, 16 S. Ct. 705.

[8] Compare Lehigh Water Co. v. Easton (1887) 121 U. S. 388, 30 L. ed. 1059, 7 S. Ct. 916.

[9] Joplin v. Southwest Missouri Light Co. (1903) 191 U. S. 150, 48 L. ed. 127, 24 S. Ct. 43; Helena Waterworks Co. v. Helena (1904) 195 U. S. 383, 393, 49 L. ed. 245, 250, 25 S. Ct. 40; Madera Waterworks v. Madera (1913) 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571; Green v. Frazier (1920) 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Puget Sound Power & Light Co. v. Seattle (1934) 291 U. S. 619, 624, 78 L. ed. 1025, 1029, 54 S. Ct. 542.

[10] Walla Walla v. Walla Walla Water Co. *supra;* Superior Water, Light & P. Co. v. Superior (1923) 263 U. S. 125, 68 L. ed. 204, 44 S. Ct. 82.

[11] New Orleans, M. & T. R. Co. v. Ellerman (1882) 105 U. S. 166, 173, 26 L. ed. 1015, 1017; Alabama Power Co. v. Ickes (1938) 302 U. S 464, 479–483, 82 L ed 374, 378–380, 21 P.U.R.(N.S.) 289, 58 S. Ct. 300, and cases

statutes regulating public utilities are claimed to confer on the appellants the right to be free of competition. Each of the states in which any of them operates, save Mississippi,[12] has established a Commission to supervise and regulate public utilities. While the statutes[13] differ in their provisions, all but that of Virginia require a public utility to obtain a certificate of convenience and necessity as a condition of doing business. The appellants commenced business in the various states prior to the adoption of the requirement of such certificates and, so far as appears, they have none covering their entire operations. They have, however, obtained certificates for extensions made since the passage of the statutes; and they claim that, in any event, these laws afford them protection from the Authority's competition since any utility now seeking to serve in their territory must obtain a certificate, and hence they have standing to maintain this suit against the Authority which has none. The position cannot be maintained. Whether competition between utilities shall be prohibited, regulated, or forbidden is a matter of state policy. That policy is subject to alteration at the will of the legislature.[14] The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in it.

Moreover, the states in which the Authority is now functioning have declared their policy in respect of its activities. Alabama has enacted that Federal agencies, instrumentalities, or corporations shall not be under the jurisdiction of its Public Service Commission;[15] that municipalities and improvement authorities may own and operate electric generating and distributing systems and may contract with a Federal agency such as the Authority for the purchase of energy, and stipulate as to the use of the energy, including rates of resale;[16] that nonprofit membership corporations may be formed for the distribution among their members of electricity with like power to contract with the Authority for the required energy.[17] Tennessee has amended § 54848 of its Code, which defines public utilities, so as to exclude Federal corporations such as the Authority from the jurisdiction of the state Utilities Commission;[18] has authorized municipalities to own and operate electric generating transmission and distribution systems and to contract for power with the Authority on terms deemed appropriate, including the fixing of resale prices;[19] has

cited; Greenwood County v. Duke Power Co. (1936) 81 F. (2d) 986, 997; Duke Power Co. v. Greenwood County (1937) 91 F. (2d) 665, 676, affirmed in (1938) 302 U. S. 485, 82 L. ed. 381, 21 P.U.R.(N.S.) 298, 58 S. Ct. 306.

[12] In Mississippi there is no state Commission, but municipalities are given the authority to regulate utilities within their territorial limits. Mississippi Code (1930) §§ 2400–1, 2414.

[13] Alabama Code (1928) § 9795; Carroll's Kentucky Statutes (1936) § 3952–25; North Carolina Code (1935) § 1037 (d); Williams' Tennessee Code (1934) § 5505–3; South Carolina Code (1934 Supp.) § 8555–2 (23); Virginia Code (1936) §§ 3693–3774k; West Virginia Code (1937) § 2562 (1).

[14] Compare Wheeling & B. Bridge Co. v. Wheeling Bridge Co. (1891) 138 U. S. 287, 292, 34 L. ed. 967, 11 S. Ct. 391; Williams v. Wingo (1900) 177 U. S. 601, 604, 44 L. ed. 905, 20 S. Ct. 793.

[15] Alabama Acts, Regular Session 1935, No. 1, p. 1.

[16] Alabama Acts, Regular Session 1935, No. 155, p. 201.

[17] Alabama Acts, Regular Session 1935, No. 45, p. 100.

[18] Tennessee Public Acts 1935, Chap. 42, p. 98.

[19] Tennessee Public Acts 1935, Chap. 32, p.

authorized the formation of nonprofit membership electric corporations with like powers to contract.[20] Kentucky has authorized municipalities to establish and maintain light, heat, and power plants;[21] and has provided for the organization of nonprofit coöperative electric corporations which may contract with the Authority for purchase of energy and stipulate as to resale prices.[22] Mississippi, which has no state law for regulation of utilities, has empowered municipal and county governments to establish and maintain electric distribution systems which may buy power from the Authority and contract as to resale prices;[23] has created a rural electrical authority and authorized the formation of power districts and nonprofit competitives, all competent to purchase energy from the Authority and distribute it and to contract with the Authority as to resale rates to consumers.[24] The Authority's action in these states is consonant with state law, but, as has been shown, if the fact were otherwise, the appellants would have no standing to restrain its continuance.

As the authority has not acted in any way in North Carolina, South Carolina, Virginia, or West Virginia, the appellant's contention that its proposed entry into some or all of them confers a right to sue for an injunction against injury thereby threatened has even less support.[25]

[8–11] The appellants may not raise any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption of the Authority from Commission regulation. For this reason Frost v. Oklahoma Corp. Commission, 278 U. S. 515, 73 L. ed. 483, P.U.R.1929B, 634, 49 S. Ct. 235, on which they rely, is inapplicable. Manifestly there can be no challenge of the validity of state action in this suit.

A distinct ground upon which standing to maintain the suit is said to rest is that the acts of the Authority cannot be upheld without permitting Federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment and sanctioning destruction of the liberty said to be guaranteed by the Ninth Amendment to the people of the states to acquire property and employ it in a lawful business. The proposition can mean only that since the Authority sells electricity at rates lower than those heretofore maintained by the appellants such sale is an indirect regulation of appellants' rates. But the competition of a privately owned company authorized by the state to enter the

28; Tennessee Public Acts 1935, Chap. 37, p. 78.

[20] Tennessee Public Acts 1937, Chap. 231, p. 882.

[21] Carroll's Kentucky Statutes (1936) §§ 3480 d–1 to 3480 d–22.

[22] Kentucky Acts, Fourth Extraordinary Session, 1936–1937, Chap. 6, p. 25,

[23] Mississippi Laws, 1936, Chap. 185, p. 354; Chap. 271, p. 531.

[24] Mississippi Laws, 1936, Chap. 183, p. 334; Chap. 187, p. 370; Chap. 184, p. 342.

[25] In fact several of the states in question have statutes which would to some extent, and in some circumstances, permit the purchase and use of power created by the Authority. In all of them municipalities may establish and operate their own distribution systems: North Carolina Code (1935) § 2807; South Carolina Code (1932) §§ 7278–7280, 8262; Virginia Code (1936) § 3031; West Virginia Code (1937) §§ 494, 591 (86) North Carolina and Virginia have statutes permitting the formation of coöperatives which may buy power from the Authority under contracts fixing resale rates: Public Laws of North Carolina, 1935, Chap. 291, p. 312; Virginia Code (1936) Chap. 159 A. South Carolina has created a State Rural Electrification Authority with power to buy electricity from any Federal agency: South Carolina Code (1936 Supp.) § 6010–2 ff.

territory served by one of the appellants would, in the same sense, constitute a regulation of rates. The contention amounts to saying that competition by an individual or a state corporation is not regulation but competition by a Federal agency is. In contracting with municipalities and nonprofit corporations the Authority has stipulated respecting the price at which the energy supplied shall be resold by its vendees. That is said to be a regulation of the appellant's business. But it is nothing more than an incident of competition; it is but a method of seeking and assuring a market for the power which the Authority has for sale, and a lawful means to that end.[26] The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.[27] These considerations also answer the argument that the appellants have a cause of action for alleged infractions of the Ninth Amendment.

Finally, it is asserted that the right to maintain this suit is sustained by certain allegations of concerted action by the officials of the Authority and the Public Works Administrator. The bill alleges that having adopted an unlawful plan the defendants have coöperated, and threaten to continue to coöperate in its execution, with Harold L. Ickes, as Administrator of the Federal Administration of Public Works, in a systematic campaign to coerce and intimidate the complainants into selling their existing systems in municipalities or territory in which the Authority desires to seize the market for electricity; that, in order to make this coercion effective, Ickes has, in coöperation with, or on request of, the Authority, announced loans and grants of Federal funds to municipalities; that the Authority and Ickes have coöperated, and continue to do so, to force municipalities to purchase the Authority's power under threats that, unless they do, proposed loans and grants for municipal systems will not be made. The bill states that, though Ickes "confederated and acted with the defendants in some of its illegal acts and is, therefore, a proper party, he is not a necessary party and is not joined as a defendant because he is beyond the jurisdiction of the court." There is a prayer that the defendants be restrained from confederating and acting in concert with Ickes for the described ends.

The district court finds that the Authority has not indulged in coercion, duress, fraud, or misrepresentation in procuring contracts with municipalities, coöperatives or other purchasers of power; has not acted with any malicious or malevolent motive; and has not conspired with municipalities or other purchasers of power. The record justifies these findings. It is claimed, however, that they are inconclusive since the court erroneously excluded much proffered evidence tend-

[26] Oregon & C. R. Co. v. United States (1915) 238 U. S. 393, 59 L. ed. 1360, 35 S. Ct. 908; United States v. Gratiot, 1 McLean, 454, 26 Fed. Cas. 12, No. 15,249, affirmed in (1840) 14 Pet. (39 U. S.) 526, 10 L. ed. 573.

[27] Compare Georgia Power Co. v. Tennessee Valley Authority (1936) 14 F. Supp. 673, 676, 15 P.U.R.(N.S.) 228.

ing to sustain the charge. An examination of the record discloses that certain of the evidence offered was properly excluded, and that in other instances the rejection of that offered constituted, at most, harmless error.

[12] Error is assigned to the trial court's refusal to permit the taking of the deposition of the Public Works Administrator. In view of the prior opportunity which the claimants had to take this deposition, the lateness of the application, and other factors, permission to take the deposition was a matter within the court's discretion and it does not appear that the discretion was abused.

The remaining assignments of error directed to the exclusion of evidence of coöperation between the two Federal agencies go to the rejection of evidence consisting largely of correspondence between them and press releases or announcements by officers of one or the other. The record contains all but a few of these rejected documents, those omitted apparently not being thought of importance. Scrutiny of them compels the conclusion that if the rejected evidence had been admitted, the trial court's holding that a conspiracy had not been proved should not be overruled.

The only findings on this subject requested by the appellants were to the effect that the Public Works Administration has coöperated with and assisted the Tennessee Valley Authority in the furtherance of the latter's power program and that the former has made contracts and allotments for loans and grants to twenty-three municipalities in the states of Alabama, Mississippi, and Tennessee, amounting to about $14,000,000 for the purpose of constructing municipal systems to distribute the Authority's power in competition with the appellants; that the applications for loan and grant in some instances specify that the municipal system will duplicate a privately owned system; in others that a large business will be done by the municipal plants because of the low promotional rates of the Authority; that some of the applications state they were filed to take advantage of the low rates offered by the Authority and that, with few exceptions, they state that the electricity to be distributed in the city will be purchased from the Authority. A further requested finding is that the applications of certain Alabama cities recite that they have secured written contracts from practically all consumers; that these contracts refer to lower rates to be secured, provided the rates charged by the city shall be thus prescribed by the Authority for resale at retail. The court refused to make the requested findings and error is assigned to this refusal. It is apparent that if the court had made the findings no conclusion of confederation or conspiracy, with malicious intent to harm the appellants or to destroy their business, would thereby have been acquired.

[13] Coöperation by two Federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. As the court below held, such coöperation does not involve unlawful concert, plan, or design, or coöperation to commit an un-

lawful act or to commit acts otherwise lawful with the intent to violate a statute.

In no aspect of the case have the appellants standing to maintain the suit and the bill was properly dismissed.

The decree is affirmed.

Mr. Justice Reed took no part in the consideration or decision of this case.

BUTLER, J., dissenting: The decision just announced goes too far. It excludes from the courts complainants seeking constitutional protection of their property against defendants acting, as it is alleged, under invalid claim of governmental authority in setting up and carrying on a program calculated to destroy complainants' business. The issues joined by the parties, tried below and fully presented to this court, include the question whether, when construed to authorize the things done and threatened by defendants, the challenged enactment is authorized by the Constitution or repugnant to the Fifth, Ninth, and Tenth Amendments. The issues also include the question whether, as being applied, the act is void because the execution of defendants' program will deprive complainants of their property without due process of law in contravention of the Fifth Amendment. This court holds complainants have no standing to challenge the validity of the act and puts aside as immaterial their claim that by defendants' unauthorized acts their properties are being destroyed.

The opinion states: "The Authority's acts which the appellants claim give rise to a cause of action, comprise (1) the sale of electrical energy at wholesale to municipalities empowered by state law to maintain and operate their own distribution systems; (2) the sale of such energy at wholesale to membership corporations organized under state law to purchase and distribute electricity to their members without profit; (3) the sale of firm and secondary power at wholesale to industrial plants."

That the substance of complainants' case may not be so compressed is disclosed by the summary of their bill that follows:

Complainants are 19 public utilities. Each, authorized by law, is engaged in generating and selling electricity within the political subdivisions of various states. Some have long-term contracts under which they furnish large quantities of electricity. They are more than able to fill the needs of the territories in which they operate and are ready to supply such additional facilities as may be needed in the future. Their properties are modern and economically operated and possess great value as going concerns. Their rates yield no more than a reasonable return and are fully regulated by the states in which they serve.

Defendants are the Tennessee Valley Authority, a body corporate created by the Act of May 18, 1936, with the right to sue and be sued, and its three directors, charged with the duty of exercising the powers of the Authority. Harold L. Ickes, the Administrator of the Public Works Administration, has confederated with defendants in some acts charged to be illegal; he is not sued because beyond the jurisdiction of the court. From its principal office at Knoxville, Tennessee, the Authority carries on a proprietary business as a public utility for the gen-

eration, transmission, distribution, and sale of electricity in Tennessee, Mississippi, Georgia, and Alabama.

On its face, the act discloses purpose to authorize a large and indeterminate number of great works for the primary purpose of creating a vast supply of electric power, to use this power to establish the United States in the business of producing, transmitting, and selling electric power, and to dispose of this power in a manner inconsistent with the principles of our dual system and so as to govern the concerns reserved to the states. Any references in the act to navigation or to any other constitutional objective are unsubstantial and mere pretenses or pretexts under which it is sought to achieve an object reserved to the states. Except with respect to power available at Wilson dam prior to the acts complained of, the program is one of creating an outlet for power deliberately produced as a commercial enterprise to be sold in unlawful and destructive competition with power now available in adequate quantities.

The program contemplates ultimately the development of all power sites on the Tennessee river and all its tributaries as an integrated electric power system, the construction and operation of hydroelectric plants at these sites, the use of auxiliary steam plants, the interconnection of all plants, and the elimination of existing privately owned utilities.

In the area of over 40,000 square miles, there are 149 water-power sites which, with auxiliary steam plants, will produce 25 billion kilowatt hours annually. Present consumption of the area is 56 per cent of that quantity. The electric power to be produced by defendants can only be sold through displacement of the complainants. Execution of the program will necessarily destroy all or a substantial part of the business and property of each of the complainants.

Defendants have taken over Wilson dam and the nitrate plant and have commenced, or recommended to Congress, the construction of 10 other dams; their program calls for 11 completed dams by July 1, 1943. They have prepared plans for the construction of high-tension transmission lines from the dams to at least 14 cities and indeed to the whole area. They have purchased or are attempting to purchase distribution systems in at least 15 cities. They have entered into contracts to sell power to various communities and industries for a 20-year period and have agreed to supply firm power to other and larger cities.

The avowed purpose of the program is to effect a Federal regulation of intrastate electric rates and service by a so-called "yardstick" method or "regulation by competition." The yardstick for wholesale rates is the wholesale rate charged by the Authority. It is unreasonable and confiscatory as a measure of complainants' rates in that it excludes the cost of the major part of the investment necessary to render the service and excludes necessary operating expenses. The yardstick for retail rates is the sum of the wholesale rate and the amount which the Authority allows municipalities to add to the wholesale rate to cover cost of local distribution; it excludes many items of necessary cost of rendering the service.

Pursuant to a plan promulgated in 1933, defendants are conducting a sys-

tematic campaign for the purpose of disrupting the established business relations between complainants and their customers, destroying the good will built up by complainants, seizing their markets and inciting the residents of communities served by them to coöperate with defendants in their scheme to develop an absolute monopoly.

With full knowledge of the noncompensatory and confiscatory character of the yardstick rates, they have represented to the inhabitants of communities served by complainants that these "yardsticks" were fair measures of reasonable rates and have thereby attempted to incite the inhabitants to build publicly owned systems using power furnished by the Authority, to lead them to believe that they are being charged unreasonable rates, to stir up political agitation against privately owned utilities and to bring complainants into disrepute and disfavor.

The defendants attempt to coerce complainants to sell distribution systems and transmission lines, in territories which defendants intend to appropriate, at prices far below fair value by threatening that, unless complainants accede, they will construct, or cause to be constructed, duplicate facilities subsidized in construction and operation by Federal funds and render complainants' properties wholly valueless. The Administrator of the Public Works Administration has coöperated with defendants. Defendants inform the owners that, unless they sell, either the Authority or the municipalities will build duplicate systems with Federal funds. At defendants' request, the Administrator authorizes and announces a gift to the municipality of from 30 per cent to 45 per cent of the cost of the duplicate system and agrees to lend the balance, repayable out of earnings, if any, of the duplicate plant, upon condition that the municipality will agree to use power of the Authority and will, as soon as possible, oust the existing utility. If the utility agrees to sell, the allotments are canceled without regard to the will of the municipality. This policy has already been applied in certain cities. The defendants and Administrator also coöperate to force municipalities to agree to purchase power furnished by the Authority by threats that otherwise Federal allotments for public works will be canceled or denied.

Defendants have caused bills, designed to forward their power program, to be submitted to the legislatures of various states in the area and have lobbied for and brought about their passage. They have installed Authority personnel throughout the area to disseminate propaganda in behalf of the program. The Electric Home and Farm Authority, a corporation set up as a governmental agency of which the individual defendants are directors, finances sale of electrical devices, prints and circulates costly advertising in praise of the Authority program. Defendants have offered to supply electricity to large industrial customers of some of the complainants at noncompensatory and discriminatory rates. They have attempted to persuade complainants' customers to break existing contracts. Complainants cannot meet this competition because of the noncompensatory rates and because they are forbidden by state law to make discriminatory rates.

The bill prays invalidation of the

act as unconstitutional and injunction and other relief against defendants.

Unquestionably, the bill shows that complainants are not asserting a right held or complaining of an injury sustained in common with the general public. They allege facts that unmistakably show that each has a valuable right as a public utility, nonexclusive though it is, to serve in territory covered by its franchise, and that, inevitably the value of its business and property used will suffer irreparable diminution by defendants' program and acts complained of. If, because of conflict with the Constitution, the act does not authorize the enterprise formulated and being executed by defendants, then their conduct is unlawful and inflicts upon complainants direct and special injury of great consequence. Therefore, they are entitled to have this court decide upon the constitutional questions they have brought here. See Massachusetts v. Mellon (1923) 262 U. S. 447, 488, 67 L. ed. 1078, 1085, 43 S. Ct. 597; Frost v. Oklahoma Corp. Commission, 278 U. S. 515, 521, 73 L. ed. 483, 488, P.U.R. 1929B, 634, 49 S. Ct. 235.

Mr. Justice McReynolds joins in this opinion.

WASHINGTON DEPARTMENT OF PUBLIC SERVICE

Davenport Hotel, Incorporated

v.

Consolidated Freight Lines, Incorporated et al.

[F. H. No. 7191.]

Service, § 143 — Failure to serve — Strike as excuse — Picketed customer.

1. Motor truck common carriers holding operating permits are not relieved of their obligation to serve a hotel customer because the hotel is picketed and officers of the drivers' union threaten a strike on the carriers' entire lines if any driver goes through the picket lines, but such a carrier, in order to relieve himself of liability, must show further that he has made every reasonable effort to secure other drivers who are willing to go through the picket lines, p. 15.

Service, § 143 — Failure to serve — Tariff provision as justification — Strikes.

2. A tariff provision that the tariff shall not be binding on motor carriers where it is impracticable to operate trucks because of riots or strikes does not excuse an authorized motor truck operator from furnishing service to a customer who is being picketed by union strikers, p. 15.

[January 25, 1939.]

DAVENPORT HOTEL, INC. v. CONSOL. FREIGHT LINES, INC.

COMPLAINT by hotel corporation against failure of motor truck operators to serve because of picketing of hotel by strikers; complaint sustained, common carrier permits suspended subject to conditions as to furnishing service, and service ordered.

By the DEPARTMENT: This matter came on regularly for hearing at Spokane on October 28, 1938, upon the complaint herein. Ferd J. Schaaf, Director of Public Service, assisted by Joseph Starin, Examiner, presided. Oral and documentary evidence and written briefs were submitted by the parties. The last brief was filed January 7, 1939. The parties were represented as follows:

Complainant: Davenport Hotel, Inc., a corporation, by C. D. Randall, of Messrs. Randall & Danskin, Attorneys, Spokane.

Respondents: Consolidated Freight Lines, Inc., Manlowe Transfer Co., Inc., United Truck Lines, Inc., Inland Motor Freight, Spokane Transfer & Storage Co., Grimmer Storage & Truck Lines, Inc., Riverside Warehouse, Inc., Wm. P. Shirk and M. R. Goodwin, doing business as Shirk & Goodwin Moving & Storage Co., by James A. Brown, of Messrs. Brown & Weller, Attorneys, Spokane; The Cater Transfer & Storage Co., Inc., by Chas. P. Lund, Attorney, Spokane; Beardmore Transfer Line, Inc., by Lloyd E. Gandy, Attorney, Spokane, and G. R. Shaefer, Superintendent, Spokane; John F. McHugo, doing business as McHugo Transfer Company, by John F. McHugo, Owner, Spokane; B. L. Skene and R. A. Skene, doing business as Lincoln Transfer & Storage Co., by R. A. Skene, Partner, Spokane.

[1, 2] Complainant corporation operates a large hotel in Spokane and in connection therewith operates restaurants, a laundry and other incidental businesses. Respondents are common carriers of freight by motor truck and hold permits from the Department and the Interstate Commerce Commission authorizing them to operate in Spokane and between Spokane and various other communities within and without the state.

It appears that on or prior to August 27, 1937, the Laundry Workers Union called a strike at the Davenport Hotel Laundry, and at other laundries in Spokane. The Laundry Union was a member of the Central Labor Council and as soon as the strike was called a picket line was thrown around the hotel and the institution was placed on the unfair list by all labor unions affiliated with the Central Labor Council. All of the affected unions are affiliates of the American Federation of Labor.

The respondents have contracts with the Teamsters Union which is also affiliated with the American Federation of Labor. When the Davenport Hotel was picketed the Teamsters Union refused to operate the trucks of respondents in making pick-ups or deliveries of intrastate freight at the Hotel. It is significant that the members of the union did not refuse to pick-up and deliver interstate freight shipments at the hotel.

The evidence indicates that all of the operators had experienced pleasant

relations with the hotel prior to the time of the strike and that they were willing and anxious to continue to serve the hotel in their capacities as common carriers of freight. The evidence shows also that they attempted to get the union drivers to agree to go through the picket lines at the hotel. On the other hand, the testimony shows clearly that their attempts did not go beyond efforts to prevail upon the officers of the Spokane Teamsters Union to permit drivers to go through the picket lines. The Teamsters Union representative advised them that if any of them went through the picket lines the drivers on the carriers' entire lines would be called out on strike. Many of the carriers operate widely throughout the state of Washington and the Pacific Northwest. It is also clear from the testimony that the operators made no attempt to secure nonunion drivers or other drivers who might be willing to replace striking union drivers.

The record is replete with proof of the fact that this action on the part of the operators not only seriously inconvenienced complainant, but resulted in real financial and other injury to it. The record shows also that some show of force was used to intimidate the carriers and prevent them from picking up and delivering at the hotel. The hotel management frequently requested and demanded service of respondents but without success. Pick-up and delivery at the hotel during this period was made by a few local nonunion truck operators and the hotel's own trucks.

Complainant prayed that the respondents be required to begin immediately to make pick-up and delivery of freight movements and that they have their permits canceled or be given other proper punishment.

The defense offered by respondents was that if they had attempted to pick-up and deliver at the hotel, the union would have tied up their entire operations through a general strike and, secondly, that their tariffs on file with the Department excused failure to pick up and deliver under the circumstances. The tariff provisions relied upon by respondents are to be found in the tariffs published by the Department and in general read about as follows:

"Impractical Operation: Nothing in this tariff shall be construed as making it binding on carriers to pick up and/or deliver freight at locations from and to which it is impracticable to operate trucks on account of conditions of highways, roads, streets, or alleys, or because of riots or strikes, or when loading or unloading facilities are inadequate."

About a week before the hearing herein was held the Teamsters Union officials suddenly notified respondents that the picket lines at the hotel were being withdrawn except between the hours of seven and nine in the morning, and that deliveries would be allowed to be made when pickets were not on duty. As a result complainant is now receiving from respondents all of the common carriage service which it desires.

A common carrier is engaged in a public service business and enjoys many privileges not accorded to private business enterprises. At the same time he assumes certain very definite obligations with respect to the public. The law clearly recognizes both these privileges and obligations. One of the

most important of a common carrier's obligations is that of handling all freight which is offered to him for movement. This is an obligation which cannot be avoided with impunity except for the most serious and weighty reasons. The carrier is not relieved from the obligation simply because his union employees refuse to disregard picket lines and restrictions imposed by another union. In order to relieve himself of liability the carrier must show further that he has made every reasonable effort to secure other drivers who are willing to go through the picket lines. Individuals and unions who accept employment in public service enterprises must govern themselves accordingly and recognize that their rights and duties are somewhat different from those of men engaged in purely private businesses.

Carriers generally are under the impression that the Interstate Commerce Commission requires interstate carriers to pick up and deliver freight at a business establishment in spite of the fact that it may be picketed. The record does not show whether the prevalence of this belief is what caused the teamsters in Spokane to authorize pick-up and delivery of interstate freight at the Davenport, but the simultaneous existence of the belief and the policy of the teamsters present an interesting coincidence to say the least.

The Department cannot agree with the contention of respondents that the tariff provision which they point out to us relieves them in this case of their common-law duty to pick up and deliver freight. The interpretation which they urge upon us is at variance with the meaning we had in mind when the tariff rule was promulgated. To rule with the carriers would be tantamount to serving notice on the shippers and the public that their primary right to the free and unobstructed flow of commerce must be sacrificed to the timidity of carriers and to the desires of labor leaders who may be maneuvering for tactical advantages in an industrial battle to which the carriers and their employees are not even direct parties.

This is recognized throughout the state as a test case. The Department fully realizes that the policy followed by the carriers is one which has been followed in this state by motor freight carriers for a long time. The Department also realizes that the carriers are again delivering and picking up freight at complainant's place of business although they were not sure how long the union officials would permit it. Under different circumstances the bare facts in the record would justify suspension or cancellation of the permits of the carriers. Under the circumstances here presented, however, we are of the opinion that the purposes of the action can be served just as well by suspending the permits of the carriers, but permitting such suspensions to be inoperative during continued compliance with the law and our order, and by assessing reasonable monetary penalties in proper proceedings as authorized by law.

CALIFORNIA RAILROAD COMMISSION

Re Rates, Rules, Classifications and Regulations for the Transportation of Property

[Decision No. 31417, Case No. 4121.]

Rates, § 425 — Motor carrier — Transportation characteristics — Stabilized transportation systems.

1. The practice of assessing motor truck rates without regard to transportation characteristics has unsatisfactory aspects which seriously threaten a stabilized transportation system, p. 25.

Rates, § 425 — Motor carrier — Flat-rate basis — Faults.

2. The two principal faults underlying the flat-rate basis for motor truck charges are (1) that such a rate tends toward uncertainty in that no shipper can know what rates his competitor is paying, and (2) that one shipper will pay more or less than another shipper for identical service depending upon the quantity and type of other traffic which one or the other may have available for shipment over a period of time, p. **26.**

Rates, § 425.1 — Motor carrier — Minimum rates — Stabilized system.

3. The goal of a stabilized, reasonable, nondiscriminatory, and compensatory motor truck rate structure can best be achieved by predicating minimum rates upon the transportation characteristics of each haul, rather than upon the aggregate operations of individual carriers or shippers, p. 26.

Rates, § 425 — Motor carrier — Split deliveries — Class rates.

4. Split deliveries under motor truck class rates will be allowed when freight aggregating 4,000 pounds or more is tendered to a carrier at one time and place so that shippers having available at one time a large amount of tonnage for shipment to several points may share in the transportation saving effected by the obtaining of a full load at one time, p. **28.**

Rates, § 425 — Motor carriers — Incidental service — Exclusive service.

5. The establishment of rates to conform to the operations of motor carriers whose services are only incidental to other activities and who allocate a large part of the overhead expenses to those other activities, would unduly prejudice carriers engaged exclusively in performing transportation services, and would jeopardize the adequacy and stability of the transportation system, p. 28.

Motor carriers, § 27.2 — Separate bills of lading — Joint shipments.

6. Separate bills of lading or shipping orders are unnecessary when a large number of shipments are tendered to a carrier at one time and at one point, and manifest freight bills may be used if they contain all the information necessary to a determination of the applicable charges, p. 29.

[October 31, 1938.]

PROCEEDING *to establish minimum rates at which opportunity is given to introduce evidence as to what modifications should be made; rate schedule amended and approved.*

WHITSELL, Commissioner: Following the receipt of evidence at extensive public hearings in this proceeding, minimum rates were established for the transportation of property by radial highway common, highway contract, and city carriers, within the Los Angeles drayage area. Thereafter, further public hearings were held at Los Angeles for the purpose of affording interested parties an opportunity to introduce evidence as to what modifications or revisions, if any, should be made in the minimum rates so established. The instant decision treats matters as to which evidence was adduced at the further hearings but as to which final disposition has not been made by prior orders herein.[1]

The evidence to be considered here consists chiefly of testimony by interested shippers and carriers as to the manner in which the existing basis of rates has affected or will affect their businesses or operations, together with various recommendations as to the changes necessary to remedy the allegedly adverse effect of the present rate structure. In general, the objections expressed were both as to the volume of the rates and as to the form and manner in which they were stated. For convenience the evidence will be grouped for discussion (1) as it relates to the general rate level, (2) as it relates to the present zoning basis, (3) as it relates to the classification of commodities, and (4) as it relates to miscellaneous rates, rules, and regulations.

The Rate Level

Objections to the general level of the present rates, particularly of those applying for the transportation of small shipments consisting of mixtures of high rated and low rated articles, were made by a few carriers and by numerous shippers. The objecting carriers testified that they were experiencing, and under the effective basis would continue to experience, a serious diversion of traffic to proprietary operations; the shippers claimed that they could not afford to pay the present rates. The latter interests insisted strenuously that they would be compelled to purchase and operate their

[1] The original decision in this proceeding (Decision No. 30600 of February 7, 1938, 41 Cal. R. C. R. 100) was predicated upon evidence received at hearings held in June, 1936, and in October and November, 1937. In March, 1938, before the rates thus provided became effective, a further hearing was had for the purpose of receiving evidence as to what changes or modifications in the initial order should be made. Following the latter hearing Decision No. 30785 (41 Cal. R. C. R. 222) was issued, making substantial revisions in the rates originally promulgated and causing the revised structure to become effective May 1, 1938. In June, 1938, after the rates had been in effect for a short time, another hearing was held and, based upon the additional evidence presented, Decision No. 31067 (unreported) was entered on June 30, 1938, making certain emergency adjustments. Thereafter, in July and August, 1938, additional hearings were held and additional evidence was received. The purpose of the instant decision is to dispose finally of matters given emergency consideration in Decision No. 31067, *supra*, and of other matters raised in the June, July, and August hearings.

own trucks or to discontinue the handling of certain lines of merchandise. They contended that a continuation of the present level would force manufacturers in other territories to distribute their products through Los Angeles harbor or through other points outside the Los Angeles drayage area.

In addition, various proposals were made as to changes in rates for particular types of services. A cost study prepared by C. H. Jacobsen and G. L. Malquist, engineers in the Commission's transportation department, was introduced to show the estimated cost of transporting shipments weighing 100 pounds or less in "parcel delivery service" for manufacturers, jobbers, and wholesalers.[2] The costs reflected in this study were as follows:

Weight in Pounds	Average Weight per Package	Cost per Package (in Cents)	Number of Packages per Shipment	Cost per Shipment (in Cents)
12 or less	5.3	10.62	1.05	11.14
Over 12 and including 32	20.7	14.49	1.10	15.94
Over 32 and including 50	38.0	17.70	1.30	23.01
Over 50 and including 100	63.0	19.90	1.50	29.84

It was stated on behalf of Los Angeles Parcel Delivery Association and United Parcel Service of Los Angeles, Inc., that the foregoing estimated costs were fairly representative of those experienced in the operations of such parcel delivery carriers and that rates for the transportation of small shipments should be predicated thereon. Some doubt was expressed, however, as to whether rates developed from such costs would be suitable for the handling of accounts involving an extremely large volume of traffic. As to such traffic it was represented that rates based upon the volume moving over a given period should be established; however, no definite proposal was made as to the volume of the rates which should be provided or the manner in which they should be stated.

Williams Transfer Company and Higgins Trucks, Inc., asked that their operations be exempted entirely from the application of the established rates or, in the alternative, that their operations be exempted as to shipments weighing 500 pounds or less. As a further alternative, they requested permission to enter into separate contractual arrangements with hardware and electrical supply dealers, manufacturers and jobbers and to file such contracts with the Commission. These carriers explained that they performed routed delivery services for manufacturers, jobbers, and wholesalers, handling shipments of all weights. They contended that the rates applicable to their operations were in excess of the cost to them of performing the services[3] and, also, that a loss of a substantial portion of their traffic to proprietary carriage or to other forms of distribution was being threatened. They claimed that the loss of their larger accounts to proprietary operations would force them to discontinue serving

[2] Delivery of parcels weighing 100 pounds or less from retail stores has been exempted from the application of the established minimum rates, and, hence, were not included in the engineers' cost study.

[3] The May, 1938, traffic of a patron of Wil-

their customers having only small quantities. The proposal for complete exemption was supported by the Los Angeles Traffic Managers Conference and Los Angeles Wholesale Institute, although certain individual members of these organizations indicated that exemption up to 500 pounds would be satisfactory.[4]

The Los Angeles Warehousemen's Association contended that the established rates were excessive in so far as they applied to traffic moved out of public utility warehouses by carriers affiliated with such warehouses. Its witnesses stated that, ordinarily, the public utility warehouses in the Los Angeles drayage area conducted auxiliary trucking services, using their warehouses as terminals. They asserted that the cost of transporting property from a terminal warehouse is less expensive than is ordinary drayage service and that the difference in cost should be reflected by a difference in rates. They called attention to the fact that in various orders establishing rates outside of drayage areas the Commission had authorized a 5-cent differential in connection with shipments of certain kinds and quantities when picked up at or delivered to a carrier's terminal. The warehouse interests pointed out, also, that the warehousing rate included delivery of the property to the loading platforms of the warehouses and that, hence, the only accessorial service ordinarily required to be performed in the carrier capacity was loading from such platforms on to the trucks. They contended, moreover, that the latitude in arranging schedules, made possible through unified control, permitted the obtaining of unusually high load and use factors.

The warehouse interests proposed that the rate differential sought be accorded by making the present intrazone rates applicable to movements from public utility warehouses to points throughout a greatly enlarged "inner zone," and that the present 2-zone scale be made applicable to points outside.[5]

---

liams Transfer Company was said to be typical of this routed service in regard to the weight of the shipments transported. The following is an analysis of this traffic:

Weight of Shipments in Pounds	Number of Shipments	Percentage
Under 100	6,594	79.2
100 to 200	734	8.8
200 to 300	293	3.5
300 to 500	256	3.1
Over 500	450	5.4
	8,327	100.0

It was testified that during the month of May, 1938, the average weight of the 8,327 shipments handled was 144 pounds, that shipments weighing less than 100 pounds averaged 20.6 pounds and that those weighing over 100 pounds averaged 671.5 pounds. Based upon book records, upon certain engineering estimates and upon test checks, a witness representing these carriers developed the cost for pick-up and delivery in the Williams' operation to be 28½ cents per delivery stop and in the Higgins' operation to be 93 cents per shipment.

[4] By Decision No. 31067, *supra,* commodity rates were established for the transportation of mixed shipments consisting of commodities rated first class or lower, with not to exceed 10 per cent of higher rated commodities. However Williams and Higgins, as well as the Los Angeles Traffic Managers Conference and Los Angeles Wholesale Institute, represented at the later hearings that these rates provided little, if any, relief in that, while they obviated the necessity of classification, they required zoning and produced excessive charges.

[5] The proposed "inner zone" would comprise all of the area now included within Zones 1 and 2 and most of Zones 3, 4, 5, and 6 as defined in Decision No. 30785, *supra.* The center zone would embrace the balance of the drayage area.

The Motor Truck Association of Southern California opposed the foregoing recommendation. It claimed that public utility warehouses performing drayage service compete with unaffiliated carriers for the warehouse traffic and that all carriers should be accorded an equality of competitive opportunity in that field.

Zoning

Under the existing basis, the Los Angeles drayage area is divided into eight zones. Four rate bases are provided (A, B, C, and D), the application of each rate basis being dependent upon the number of zones traversed. A "grasshopper" scale is provided for shipments weighing less than 100 pounds, the rates for shipments of such size being independent of zoning.[6] Only minor objections to this zoning plan were offered, in so far as it applied to general drayage operations involving shipments of substantial quantities. However, Williams Transfer Company and Higgins Trucks, Inc., asserted that the zoning plan was impracticable for the routed delivery services which they performed, in that it complicated the computation of charges by shippers. In addition, they claimed that the difference in rates between an intrazone movement and movements between zones was not representative of the additional cost of performing deliveries in a routed service, in that numerous shipments destined to the outer zones were ordinarily transported in one truck at one time. These carriers were fearful that the present zoning arrangement, if continued, would cause a substantial loss of traffic to proprietary operation. Shippers utilizing these carriers testified to the same effect.

As previously mentioned in connection with the recitation of evidence relating to the rate level, the Los Angeles Warehousemen's Association also sought substitution of a 2-zone plan for the present 8-zone arrangement, for application on shipments originating at public utility warehouses. In addition to their representations as to the excessive volume of the rates for that type of service, the warehouse interests asserted that many of their patrons are located outside of Los Angeles and are not familiar with the geographical location of the points to which shipments moving out of the warehouses are destined. They claimed that these shippers were unable to calculate charges in advance of movement and that the inconvenience thus created was causing these shippers to distribute from points outside the drayage area. The warehouse interests stated, moreover, that warehouses located in different zones are ordinarily competitive with each other and that the zoning plan had a tendency to divert storage business to the more central warehouses, to the prejudice of those located further from the usual destination points. Certain shippers testified that their merchandise was sold at a flat price throughout the Los Angeles area and that, hence, a flat rate from distribution warehouses without regard to destination was required.

[6] A schedule naming charges "per shipment," dependent upon the weight bracket in which the shipment falls, as distinguished from a schedule naming rates in cents per 100 pounds or other unit, is commonly referred to as a "grasshopper" scale.

A witness for the Union Pacific Railroad stated that under the existing zoning arrangement the principal freight depots of the rail lines serving Los Angeles were exclusively in Zone 1 except in the case of the freight depot of the Southern Pacific Company at 1281 North Spring street. This depot, he said, was partly in Zone 1 and partly in Zone 2. Thus, he contended, the Southern Pacific Company had an undue advantage in competing for traffic. The witness suggested that the boundaries in Zone 1 be redescribed so as to place the depot wholly within the zone. No one opposed the proposed change.

Counsel for Pacific Iron and Steel Company and Johnson Steel & Wire Company, Inc., which companies maintain plants at 11633 South Alameda street and 11641 Mona boulevard, respectively, requested that the drayage area be enlarged so as to include these plants within Zone 7. He stated that no advantage would accrue to these companies by such action, but that their competitors were located within the drayage area and that approval of the recommendations would provide comparable rates for competing concerns. No objections to this request were voiced.

Classification of Commodities

As previously indicated, the rates presently in effect for shipments weighing less than 100 pounds are in the form of a "grasshopper" scale. Rates are stated in cents per shipment and are not dependent upon the type of commodity of which the shipment consists. However, rates for heavier shipments are stated in class rate form, rates being provided for four classes and commodities being rated according to the class provided therefor (without regard to packing requirements) in Western Classification No. 67, C.R.C. No. 6 (of J. P. Haynes, Agent), in Pacific Freight Tariff Bureau Exception Sheet No. 1–P, C.R.C. No. 597 (L. F. Potter series), supplements thereto and reissues thereof, or by special exceptions in the order itself. Several shippers contended that the burden of classifying commodities is wholly disproportionate to whatever value the classification plan may have from a transportation standpoint, at least in connection with shipments ranging in weight from 100 to 500 pounds.[7] These shippers asserted that they would give serious consideration to the purchase and operation of their own trucks unless the classification plan were abandoned in favor of a flat rate for all commodities.[8]

[7] A representative of one of the larger shippers claimed that increased clerical and shipping room expense would be not less than $166.91 per week. The representative of another larger shipper estimated such expense at a minimum of $625 per month. Both asserted that it would be necessary for their concerns to employ additional weighers, wrappers, billing clerks, and rate men and to incur additional packing expenses.

[8] A witness for a shipper estimated that $100,000 would defray the expense of purchasing a fleet of 40 to 50 trucks for use in the Los Angeles drayage area and in adjacent territory. He admitted that he had no definite figures on either the purchase price or cost of operations but claimed that he was convinced that his firm could accomplish these deliveries in its own trucks at less expense than that accruing at existing for-hire carrier rates. He stated that, during the first six months of 1938, his firm paid Williams Transfer Company $16,968.44 for Los Angeles drayage and other for-hire carriers approximately $8,000 for suburban deliveries. Another witness claimed that a survey had convinced him that by installing his own truck equipment and using it for other services when not required in city deliveries, the expense of drayage in Los Angeles would not

For-hire carriers performing a general drayage service did not express any objection to the classification method of stating rates. However, the carriers performing routed delivery services stated that prior to the effectiveness of the established minimum rates they had quoted rates in cents per shipment or per package, regardless of the classification of the commodity or the destination of the shipment. They claimed that the burden of classification increased overhead costs of carriers and shippers without producing offsetting benefits.

The Warehousemen's Association asked that a modified classification basis be provided for shipments moving out of public utility warehouses. It suggested that a basis somewhat similar to that in effect in the San Francisco drayage area (Decision No. 28632, as amended, in Case No. 4084, March 16, 1936) be adopted.[9]

Miscellaneous Rates, Rules, and Regulations

The parcel delivery carriers claimed that the requirement that a freight bill be issued for each shipment imposed an unnecessary and undue burden upon their operations. They stated that a large number of shipments were ordinarily picked up at one time at one point of origin, and that the acceptance of "manifest" (or consolidated) shipping instructions should be permitted. They asserted that shipping documents of that type could be used to compile a blanket freight bill at stated intervals and would thus be sufficient to accomplish all the purposes of the individual freight bill. The parcel delivery carriers were strongly supported in these contentions by a large group of shippers who asserted that individual shipping orders and freight bills made necessary the addition of office equipment and the employment of more clerks without serving any useful purpose.

The aforementioned group of carriers also urged that the charges established for the collection and remittance of moneys collected (C. O. D. charges) were excessive. The carriers proposed a charge for this service of 10 cents for the first $100, plus a charge of 5 cents for each $100 or fraction thereof in excess of this amount. They represented that charges of this volume had proven remunerative in the past. The proposal was specfically endorsed by many of the parties and objected to by none.

Los Angeles Parcel Delivery Association, Los Angeles Wholesale Institute, and Los Angeles Traffic Managers Conference requested that the hourly vehicle unit rates named in Item 800 of Appendix "A" of Decision No. 30785, *supra,* be modified by reducing the minimum charge from one hour to one-half hour. They assailed the present minimum charge as excessive when applied to deliveries requiring one-half hour or less to accomplish. They asserted that the hourly rates were involved principally when shippers requested immediate deliveries and that the resulting charges were substantially in excess of the normal rates.

The Motor Truck Association of Southern California urged that edible

exceed 12 cents per 100 pounds. He likewise had no definite figures to substantiate his contention.

[9] In that order ratings are provided specifically for numerous articles, and those not named are subject to ratings and packing requirements in the western classification.

nuts, in the shell, be accorded the rates in Item 730–A of Appendix "A" to Decision No. 30785, as amended.[10] Its witness stated that the California Walnut Growers Association had advised the carriers that unless their shipments could be transported by for-hire draymen at rates equivalent to those established for the commodities contained in the aforementioned item, the Growers Association would arrange to perform its own drayage. The Truck Association claimed, also, that the weight, bulk, susceptibility to damage and other transportation characteristics of edible nuts were substantially similar to those of the commodities now enjoying the commodity rates. This organization also requested that the application of commodity rates on sugar named in Item 740–A of Appendix "A" to Decision No. 31067, *supra,* be limited to movements from storage in public utility warehouses. A witness for the association stated that the presently established rates on sugar are based on warehouse trucking costs and would not be remunerative for other traffic.

E. H. Ford, a carrier engaged in the transportation of lumber and forest products, requested that the 70 per cent of fourth class rating, minimum weight 20,000 pounds, now applicable to these commodities be made subject to a minimum weight of 4,000 pounds and restricted to shipments of lumber and forest products which do not require "hand loading or unloading" by the carrier. In support of this request he testified that 95 per cent of the lumber transported by for-hire trucks in the drayage area was loaded by use of cranes furnished by shippers and was unloaded mechanically at destination. He contended that the proposed 70 per cent of fourth class rating, minimum weight 4,000 pounds, was compensatory when shipments were loaded and unloaded mechanically, but that when the carrier performs hand loading and unloading, this rating would not produce compensatory rates.[11] He suggested the establishment of a fourth class rating when such services are involved. The proposal was not opposed.

Owens-Parks Lumber Company urged that minimum rates for sash and doors be readjusted to a basis of 3 per cent of the invoice price of these commodities. A witness for the company testified that such basis was necessary due to a long-established trade practice of selling such materials on a delivered basis; that no means of determining actual weights was available; and that, prior to the establishment of minimum rates, it has been customary for for-hire carriers to perform deliveries of sash and doors at the sought basis. The witness claimed that the basing of charges on invoice value had proven satisfactory to all parties concerned.

Conclusions

[1] It will be seen from the foregoing recitation of evidence that the principal objections were directed against the volume of the established rates for small shipments and to the

[10] The item referred to names zone commodity rates for numerous commodities, including beans, peas, canned goods, cement, flour, compressed gases, glassware, grain, iron and steel articles, paper, rice, roofing, salt, and sugar.

[11] Ford stated that his expense for hand loading and unloading averaged 3.92 cents per hundred pounds.

difficulty of computing charges on mixed lots of property. It will also be noted that these two major objections were advanced and supported mainly by manufacturers, wholesalers, and jobbers whose shipments ordinarily include a variety of small items of differently classed merchandise for distribution throughout the drayage area and by the few carriers who handle that type of traffic in routed delivery services. These shippers and carriers have been accustomed, so it is asserted, to estimating the aggregate cost of performing service for each shipper over a given period, and of determining the average cost per shipment by dividing the estimated aggregate cost by the estimated number of shipments which will be made in the given period. This cost per shipment has then been used as a basis for contracting between the carrier and the shippers whose traffic has been so analyzed, the rate ultimately agreed upon being ordinarily stated in cents per package or per shipment, with no regard to weight, type of commodity, or distance to be transported. The resulting flat-rate basis avoided, of course, the necessity for weighing, classifying, and zoning, and, under the contract rates applied prior to the establishment of minimum rates, has apparently been considered satisfactory by the larger shippers. However, the practice of assessing rates without regard to transportation characteristics has certain unsatisfactory aspects which may not have been apparent to the shippers and carriers who are seeking its perpetuation here, but which, nevertheless, are serious threats to a stabilized transportation system.

[2] A surface defect in the flat-rate basis previously applied is that it has not in all instances produced compensatory operations. Surprisingly enough, the two carriers who are seeking most vigorously either exemption of their operations from the established minimum rates or permission to contract with each shipper individually, suffered substantial losses during the period immediately preceding the effectiveness of the minimum rates.[12] However, this is a defect which could probably be remedied by an increase in the contract rates. The two principal faults underlying the flat-rate basis are (1) that such a rate plan tends toward uncertainty in that no shipper can know what rates his competitor is paying and (2) that one shipper will pay more or less than another shipper for identical service, depending upon the quantity and type of other traffic which one or the other may have available for shipment over a period of time.

[3] With the enactment of the Highway Carriers' and City Carriers' Acts the duty has devolved upon the Commission of providing a stabilized rate structure which will be reasonable and nondiscriminatory as to the public at large and compensatory as to the carriers. Having in mind that the traffic of certain shippers consists of a wide variety of commodities moving between a wide number of points and territories whereas other shippers distribute only a few commodities between a limited number of points, and

[12] The record shows that Williams Truck Company and Higgins Trucks, Inc., lost $2,500 and $1,304, respectively, during the period from January 1 to May 31, 1938. Except for the last month of this period the operations were not affected by the minimum rate order.

having in mind also that the operations of certain carriers embrace transportation of many commodities throughout wide territories whereas the operations of others are extremely limited in nature and scope, it appears that the goal of a stabilized, reasonable, nondiscriminatory, and compensatory rate structure can best be achieved by predicating minimum rates upon the transportation characteristics of each haul, rather than upon the aggregate operations of individual carriers or shippers. In this way large and small carriers may compete on equal terms for all or any portion of the traffic of each shipper. At the same time, each small shipper will be assured that his larger commercial competitors are paying equivalent rates for equivalent service.[13]

As pointed out in previous orders in this proceeding, a rate structure designed to give recognition to differences in transportation characteristics of commodities and to differences in lengths of haul must, of necessity, contain some basis for classification and zoning. The western classification and exception sheet appeared to contain the most reasonable and comprehensive rating plan of any suggested at the initial hearings and were consequently adopted for use in applying the minimum rates. These publications are in wide use throughout the United States and most shippers have acquired detailed knowledge of their contents through long use in connection with line-haul transportation over a period of many years. No alternate plan offered at either the initial or subsequent hearings would appear to simplify materially the western classification and exception sheet method of rating. The 8-zone plan employed in the existing structure to give recognition to differences in lengths of haul, while concededly requiring some knowledge of the geography of the Los Angeles drayage area, should not be found particularly difficult of application after the boundaries have become familiar through constant usage. It will be recalled that in Decision No. 30600, *supra*, the Commission proposed a 6-zone plan. Upon strenuous representations that at least ten zones were essential, the present 8-zone plan was finally adopted. It does not appear, therefore, that the number of zones should now be reduced.

For the reasons just stated, it would seem that the objections to the present basis should, if possible, be satisfied by revision in the rates themselves, rather than by discarding the classification and zoning scheme.[14] Accordingly, it is recommended first that the rates for shipments weighing less than

[13] The foregoing conclusion is strongly supported by the legislative outline of the manner in which the acts referred to were to be administered. Section 10 of the Highway Carriers' Act provides in part as follows: "In establishing or approving such rates the Commission shall take into account and give due and reasonable consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or, of any accessorial service and the value of the commodity transported and the value of the facility reasonably necessary to perform such transportation service." (California Gen. Laws, Act 5129a.)

Section 9 of the City Carriers' Act contains similar language.

[14] Decision No. 31067, *supra*, attempted to accomplish this purpose by the establishment of commodity rates for mixed shipments of differently classed items; however, the volume of the rates apparently was not sufficiently low to enable full advantage to be taken of the relief from the classification burden thus accorded.

100 pounds be revised. Consistent with the estimated costs developed by engineers Jacobsen and Malquist, it appears that the present "grasshopper" scale starting at 9 cents per shipment and progressing to 45 cents should be adjusted to commence at 10 cents and to progress to only 30 cents. This should result in substantial relief for small shipments as far as the rate level is concerned. No one has asserted that the rate structure is unduly complex for shipments of such size inasmuch as a flat charge applies without regard to classification or zoning.

The foregoing would require a related adjustment in the present minimum charge of 50 cents, applicable in connection with shipments weighing 100 pounds or more. If the charge for a shipment weighing 99 pounds is to be 30 cents, a minimum charge of 35 cents for a 100-pound shipment would appear to be proper.

Substantial further relief to shippers dealing in a variety of small items may be afforded by reducing the class rates for shipments weighing from 100 to 500 pounds, and by narrowing the spread between the four classes. One effect of this would of course be to produce lower transportation charges in the aggregate. Another result would be to reduce the penalty for failure to classify commodities. This would enable shippers to apply the rating on the highest rated article to mixed shipments of several commodities without creating excessive rates thereby, and would thus make available what in its practical effect would be a flat rate. At the same time, the retention of the classification plan would enable shippers who desire to classify their commodities and thus distribute the transportation burden to derive some benefit by so doing. With a substantial reduction being made in the 100–500 pound class rates no good reason would appear to be served by retaining the 500-pound weight bracket for class rates and its removal would promote simplicity. That bracket should therefore be eliminated.

[4] In order that shippers having available at one time a large amount of tonnage for shipment to several points may share in the transportation saving effected by the obtaining of a full load at one point, a rule should be added permitting split deliveries under class rates when freight aggregating 4,000 pounds or more is tendered to the carrier at one place and at one time. A sliding scale of additional charges should be provided, however, based upon the number of added stops, to compensate the carrier for the extra service required. This rule being added and the class rates being reduced substantially, the need for the freight rates added by Decision No. 31067, *supra,* and for those provided in Item No. 710 of Decision No. 30785, *supra,* would appear to be removed and such rates should be canceled.

Further relief may, on this record, be accorded through the consolidation of rate basis D with rate basis C and through a reduction in the rate increment for the remaining three rate bases. The effect of this would be a substantial reduction in rates for shipments moving to the outer zones and would ease in a measure the difficulties said to be attendant upon zoning.

[5] The proposal of the warehouse interests that its members who conducted ancillary drayage services be

accorded a rate differential through the establishment of a two-zone plan was the same in all essential respects as that considered by the Commission in Decision No. 30785, *supra*. As therein pointed out, the establishment of rates to conform to the operations of carriers whose services are only incidental to other activities, and who allocate a large part of the overhead expenses to those other activities, would unduly prejudice carriers engaged exclusively in performing transportation services, and would jeopardize the adequacy and stability of the transportation system.[15] Moreover, although the warehouse interests have pointed out that ancillary drayage operations may be more economical than ordinary drayage in that only terminal pick-up is performed, the evidence is not convincing that the alleged economies are not offset by greater expenses in other items, such as load and use factors. In any event, the reductions in the general rate level should lessen if not eliminate entirely the threatened loss of storage and cartage business and remove much of the cause for objection.

The proposal of the Union Pacific Railroad Company that Zone 2 be rebounded to exclude the Southern Pacific Company's freight depot at 1281 North Spring street should be adopted. This is a minor change which was not opposed and appears to be necessary in order to give the several rail carriers a competitive rate parity. It also appears that the plants of Pacific Iron and Steel Company and Johnson Steel & Wire Company, Inc., are located in territory adjacent to that embraced within the drayage limits and that the extension of the drayage area will accomplish a harmonious rate adjustment with respect to competing shippers engaged in the same lines of endeavor.

[6] In so far as the proposal relating to the use of manifest freight bills is concerned, it has been made evident that when a large number of shipments are tendered to a carrier at one time and at one point separate bills of lading or shipping orders are unnecessary. The provisions of orders heretofore issued in this proceeding in this regard should be relaxed so as to permit the acceptance of such shipping documents, provided they contain all the information necessary to a determination of the applicable charges.

The proposed reductions in C.O.D.

[15] In Decision No. 30785, *supra*, the Commission said: "On the other hand the suggestion of the Warehouse Association admittedly has the disadvantage of attempting to average such important and in this instance widely varying transportation cost factors as length of haul, traffic congestion, and density of available traffic. Apparently realizing that certain of its proposals have slight relation to the cost of performing the service, the Warehouse Association urged that transportation services rendered by its members were ancillary to their public utility warehouse business. Apparently these warehousemen are not expecting any return from transportation so long as this activity permits the offering of a complete distribution service under one management and is thus advantageous to the warehousing business. Obviously, requiring carriers whose principal activity is the transportation of property to adapt their services and charges so as to conform to those of concerns whose activities in the transportation field are incidental to activities in another enterprise, would not be conducive to the maintenance of adequate and dependable transportation. True, the Warehouse Association did not urge that other carriers be required to observe the same zoning arrangement which it sought for its members. However, the alternative, if the Warehouse Association's proposal is to be given effect, is the prescription of two schedules of rates, one for for-hire trucking operations of warehouses, and another and higher one for other for-hire carriers. Neither alternative is justified by evidence of record."

charges are entirely inconsistent with C.O.D. charges in effect in other drayage areas and territories and should not be adopted in the absence of supporting data showing that they will be reasonably remunerative for the risk and service involved.

The request that hourly vehicle unit rates named in Item 800 of Appendix "A" of Decision No. 30785, *supra,* be modified by reducing the minimum time for computing charges from one hour to one-half hour does not find support in this record. It appears that this modification is sought for the purpose of enabling parcel delivery carriers to effect emergency deliveries; however, the per shipment rates appear to be sufficiently low to obviate the need for using the hourly basis on shipments of that type.

The Motor Truck Association's contention that the temporary rates on sugar established by Decision No. 31067, *supra,* should be limited to movements from public utility warehouses has not been substantiated. The association has not established that there are no other comparable movements of that commodity. If such traffic does exist or should develop in the future, it seems obvious that carriers would experience costs consistent with those predicated upon ex-warehouse drayage.

The reasons advanced by the Truck Association in support of the commodity rates it proposed for the transportation of edible nuts are substantially the same as those recited by the Commission in reaching its conclusion in Decision No. 30785, *supra,* that commodity rates were necessary to forestall diversion of certain commodities to proprietary operations. The proposal should be approved.

The proposal of E. H. Ford that the 70 per cent rating on lumber and forest products be made to apply on shipments of 4,000 pounds or more when mechanically loaded and unloaded has not been justified. Conceding that there is a difference in the cost of hand loading and unloading compared with mechanical handling, it has not been shown that the class ratings now provided result in excessive charges in the aggregate for lumber or forest products which are handled entirely by mechanical means. The proposal of Owens-Parks Lumber Company that rates for sash and doors be established upon a basis of 3 per cent of their invoice value takes into account only one of the many factors ordinarily considered in the fixation of rates, i. e., the value of the commodity transported. On this record sufficient cause has not been shown for such a radical departure from usual and ordinary rate-making practices.[16]

Findings

Upon consideration of all the facts of record, I am of the opinion and find that Decision No. 30785 of April 11,

[16] In Re Application No. 21909 of W. J. Tannahill & Sons, Decision No. 30960 of June 6, 1938, the Commission said:

"However, the proposal to assess charges in connection with shipments of sash and doors on the basis of 3 per cent of the invoice price cannot be authorized in that form, and there is no evidence of record from which it could be converted to a cents per 100 pounds or board foot basis. The objection to basing rates on invoice prices is that the price factor is indeterminable from an enforcement standpoint, and is subject to fluctuations which are outside the Commission's knowledge or control."

1938, as amended, in this proceeding, should be further amended to the extent indicated in the order herein; and that in all other respects said decision as amended should remain in full force and effect.

UNITED STATES SUPREME COURT

A. E. McDonald

v.

Ernest O. Thompson et al.

[No. 55.]

(— U. S. —, 83 L. ed. —, 59 S. Ct. 176.)

Statutes, § 19 — Construction — Remedial measures — Federal Motor Carrier Act.

1. The Federal Motor Carrier Act is remedial and to be construed liberally, and the proviso defining exemptions from the requirement of a certificate of convenience and necessity is to be read in harmony with the purpose of the measure, p. 33.

Certificates of convenience and necessity, § 60 — When required — Federal regulation — Prior bona fide operation.

2. The proviso of the Federal Motor Carrier Act under which a motor carrier engaged in bona fide operation as a common carrier by motor vehicle on June 1, 1935, is exempted from proving public convenience and necessity in order to obtain a certificate from the Commission, extends only to carriers plainly within its terms; to limit the meaning to mere physical operation would be to eliminate "bona fide," p. 33.

Statutes, § 17 — Construction.

3. All words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent, p. 33.

Certificates of convenience and necessity, § 61 — When required — Federal Motor Carrier Act — State regulation — Prior bona fide operation.

4. The provision of the Federal Motor Carrier Act that if any motor carrier was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over routes for which application for a certificate is made, and has so operated since that time, the Interstate Commerce Commission shall issue a certificate without requiring further proof of public convenience and necessity and continuance of operation pending determination of the application shall be legal, does not extend to one operating as a common carrier on public highways of a state in defiance of its laws, p. 33.

UNITED STATES SUPREME COURT

CERTIORARI to review decree of Circuit Court which reversed decree restraining state Commissioners from interfering with motor carrier transportation in interstate commerce for failure to obtain authority from the state; affirmed. For lower court decision, see 95 F. (2d) 937.

APPEARANCES: Lloyd E. Price and T. S. Christopher, both of Fort Worth, Texas, argued the cause for petitioner; William McCraw and Albert G. Walker, both of Austin, Texas, argued the cause for respondents.

Mr. Justice BUTLER delivered the opinion of the court: Petitioner brought this suit in the Federal court for the northern district of Texas against the members of the Texas Railroad Commission and its enforcement officers to enjoin them from enforcing against him the state Motor Truck Law.[1] Respondents answered; there was a trial; the court made findings of fact, stated its conclusions of law, and entered a decree permanently enjoining respondents from interfering with petitioner's business in interstate transportation. The circuit court of appeals reversed and remanded with directions to dismiss the bill. (1938) 95 F. (2d) 937. This court granted a writ of certiorari. (1938) — U. S. —, 83 L. ed. —, 59 S. Ct. 64.

Section 3 of the state law requires every carrier of property by motor for hire over public highways of the state to obtain from the Railroad Commission a certificate of convenience and necessity. Section 4 makes it the duty of the Commission to regulate the transportation, to prescribe rules for safety of carriers' operations, and to supervise all matters affecting relationships between the carriers and the public.

The Federal Motor Carrier Act, 1935,[2] § 206(a), declares that no common carrier by motor vehicle subject to its provisions shall engage in interstate commerce unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the operation. A proviso in that section declares that, if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935," over routes for which application is made and has so operated since that time, the Commission shall issue the certificate without requiring further proof that public convenience and necessity will be served by the carrier's operation. Pending determination of the application, the applicant is authorized to continue operations.

Since some time before the passage of the act, petitioner has been continuously using Texas highways in interstate transportation of property by motor vehicle for hire. Claiming to have been in bona fide operation as contemplated by the proviso, he made timely application to the Interstate Commerce Commission for a certificate authorizing him to continue to

[1] Acts Reg. Sess., 42d Leg. 1931, Chap. 277; Vernon's Tex. Anno. Civ. Stat., Art. 911b.

[2] Act of August 9, 1935, 49 Stat. at L. 543, 551, Chap. 498, 49 USCA § 306(a).

perate over the highways he has been using. The application is still pending, and petitioner insists that, notwithstanding state law, he is entitled to continue operations under the proviso. The question first to be decided is whether his claim of bona fide operation is well founded.

In May of 1934 he applied to the State Commission for a certificate authorizing operation as a common carrier in interstate commerce. July 14, 1934, the Commission denied the application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. Petitioner appealed to the district court of Travis county and obtained a decree enjoining the Commission from interfering with his operations. The court of civil appeals, January 8, 1936, reversed and dissolved the injunction. 90 S. W. (2d) 581. Thus it appears that petitioner's operations have been without authority of the Texas Commission and, unless within the proviso of the Federal act, without authority of Federal law.

[1-4] Exact definition of "bona fide operation" is not necessary. As the act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. Piedmont & N. R. Co. v. Interstate Commerce Commission (1932) 286 U. S. 299, 311, 76 L. ed. 1115, 1123, 52 S. Ct. 541. To limit the meaning to mere physical operation would be to eliminate "bona fide." That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. D. Ginsberg & Sons v. Popkin (1932) 285 U. S. 204, 208, 76 L. ed. 704, 708, 52 S. Ct. 322, 19 Am. Bankr. Rep. (N. S.) 205; Ex parte Public Natl. Bank (1928) 278 U. S. 101, 104, 73 L. ed. 202, 203, 49 S. Ct. 43. There is nothing to justify rejection of these qualifying words. The expression, "in bona fide operation," suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a state in defiance of its laws.

As petitioner is not protected in his operation as a common carrier by the proviso, we need not consider to what extent, if at all, the Federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

Affirmed.

VERMONT SUPREME COURT. LAMOILLE

Aime Valcour

v.

Village of Morrisville

[No. 705.]

(— Vt. —, 2 A. (2d) 312.)

Pleading, § 12 — Demurrer to amended pleading — Sufficiency.

1. The question for consideration, on demurrer to an amended pleading is the sufficiency of the pleading itself and not the right of the party to file it, p. 36.

Public utilities, § 21 — Tests of status — Charter — Acts.

2. The important thing, in determining if a corporation is a public utility, is what it does, not what its charter says, p. 39.

Municipal plants, § 17 — Electricity — Surplus — Devotion to public use.

3. A municipality which operates an electric generating plant that produces more energy than the village can use can devote the surplus to the public use until the needs of the inhabitants of the municipality require all of the electric energy generated, p. 39.

Discrimination, § 217 — Municipal plants — Service.

4. A municipality which operates an electric generating plant that produces more energy than the village can use and which has built up a profitable business in selling the surplus energy outside its limits in a territory in which it has a monopoly, cannot be permitted to discriminate between those desiring such service so long as it serves and monopolizes this territory, p. 39.

Public utilities, § 57 — Status of municipal plant — Electric service.

5. The fact that a municipal electric plant, producing more energy than the village can use and selling such surplus outside the village, has treated this part of its business as subject to the supervision of the Commission tends to show that it has dedicated this business to the public use, p. 40.

[November 1, 1938.]

APPEAL *from order of the Commission requiring a municipality to supply electric energy to a private citizen; order affirmed and cause remanded. See also, 108 Vt. 242, 15 P.U.R. (N.S.) 428, 184 Atl. 881.*

APPEARANCES: Fleetwood & Parker, of Morrisville, and Guy M. Page, of Burlington, for appellant; Finn & Monti, of Barre, for appellee.

SHERBURNE, J.: This case has been here before. See (1936) 108 Vt. 242, 15 P.U.R.(N.S.) 428, 184 Atl. 881. Petitionee is a municipal corporation

nd operates an electric utility within he corporation limits and distributes nd sells electric energy outside these imits. The petitioner owns and resides pon a farm in Stowe not far from petitionee's high-tension line conveying urrent to the electrical department of he village of Stowe. Prior to August 10, 1930, the petitionee was delivering current to said farm. On that date the barn upon said farm was destroyed by a fire, which was attributed o the negligence of the petitionee in he delivery of such current. See Valcour v. Morrisville (1932) 104 Vt. 119, 158 Atl. 83. Since the fire, although requested, the petitionee has refused to supply current to the petitioner. This is a proceeding to compel the petitionee to supply such current. When this case was here before he petition was based upon the provisions of P. L. §§ 6452 and 6453, but in affording the relief prayed for he Public Service Commission, after making findings of fact, the substance of which is given in the report of that case, based its jurisdiction upon other grounds. That order of the Commission was reversed and the cause was remanded.

Doubtless prompted by a suggestion in the opinion of that case, to which we will later refer, the petitioner asked and obtained leave to file an amended petition with the Commission after the remand. This amended petition, partly in addition to facts formerly alleged, shows that since the petitionee became engaged in the business of generating electricity in 1895, it has increased the capacity of its plant from 80 horsepower to upwards of 4,000 horsepower, and now has an investment of approximately $600,000 and generates approximately 5,250,000 kilowatt hours of electric energy annually, and has net earnings of over $35,000; that it supplies electricity to the municipal electric plants of the villages of Stowe, Hyde Park, Johnson, and Hardwick for sale to their inhabitants; that it supplies all of the electric energy used by upwards of 140 farmers on approximately 147 farms outside of the petitionee village in the vicinity of Cady's Falls, Morristown Corners, the Laport road, Elmore road and village, Randolph road, Elmore Mountain road, and in the vicinity of petitionee village, and including neighboring farmers located upon both sides of the petitioner and all the farmers using electric energy between the villages of Morrisville and Stowe, all at uniform rates; that it sells, and heretofore has sold, outside of the petitionee village limits more than 50 per cent of the electric energy generated by it to the public generally, and to all persons, companies, associations, and corporations, municipal, public, and private, that desired the same, indiscriminately at regular rates; that it wholly dominates the territory covered so that other utilities are precluded from entering therein as competitors or to serve the petitioner; that it has transmission lines within 500 yards of the petitioner's buildings, and wires extending to such buildings; and that it heretofore has been, and now is, able to supply electric energy to the petitioner. The amended petition further shows that the development of petitionee's plant has created a surplus which is not, and has not been temporary, casual and incidental, but that it is far beyond what is or will be required to serve the needs of the peti-

tionee village, and that although the petitionee ostensibly only sells its surplus, it has in reality created a surplus far in excess of the needs of the inhabitants of said village.

The amended petition was demurred to, the demurrer was overruled, and the petitionee was again ordered to supply electric energy to the petitioner upon the same terms and conditions whereby it sells such energy to consumers residing in the vicinity of the petitioner. From this order the petitionee has appealed.

The questions presented for review are those raised by the demurrer. The first, third, and seventh grounds of demurrer are:

1. "The matters contained in said petition are res adjudicata between the parties as appears from the records and files in said cause."

3. "Petitioner is estopped by the record in this proceeding from asserting that petitionee is under duty to serve the petitioner as prayed in said petition."

7. "It appears from the record that the Commission is without jurisdiction, right, or power to grant the relief sought by the petition."

As to these grounds it is sufficient to point out that when this case was here before we mentioned that there were no findings upon certain matters, and suggested that a case might be presented in which we should determine whether the surplus from a municipal utility may or may not be devoted to public use without express legislative authority.

[1] The fourth ground of demurrer is: "The record shows that the petitioner has had his day in court, including hearing of all the evidence presented, and determination of all facts material to his petition, and he is not entitled to a rehearing and redetermination of said issues under an amended petition." If there is any merit to this contention it should have been raised upon an exception to the order allowing the amended petition to be filed. On demurrer to an amended pleading, the question for consideration is the sufficiency of the pleading itself, and not the right of the party to file it. 49 C. J. 556.

The other grounds of demurrer go to the merits, and insist that under the law of the case the allegations are insufficient to warrant the relief prayed for; that considered in connection with the record in this proceeding they establish that the petitionee is not a public utility at the place where petitioner seeks service; and that the petition does not allege such matters as in the circumstances of the case entitle the petitioner to the relief prayed for.

It is appropriate to quote from Valcour v. Morrisville (1932) 104 Vt. 119, 131, 132, 158 Atl. 83, 86, as follows: "In acquiring and operating any kind of a public utility, a municipal corporation acts in its private or proprietary, as distinguished from its public or governmental, capacity, since the furnishing of water or lights to its inhabitants is in no sense a governmental function. It holds the property comprising such utility, primarily, for its own and its inhabitants' use. If the operation of the utility for the primary object for which it is created produces a surplus of water, light, etc., dictates of common business prudence require that it be disposed of and its proceeds devoted to the use of the municipality or its inhabitants. That

it has the right to dispose of such surplus within its corporate limits without special legislative authority, we entertain no doubt; and we see no logical reason why it may not likewise dispose of such surplus outside its limits, since its right to do so in either case is purely incidental to the primary object for which it was created, and in neither is it discharging a governmental function. We hold, therefore, that the defendant had the right to dispose of its surplus electricity outside its own limits and to extend its equipment as might be necessary for that purpose." That case holds that in such operations the defendant was not acting as a public utility, but that its relations with its customers were purely contractual, and that it had no authority as a public utility to operate outside its limits. In the declaration in that case the plaintiff sought damages because of the alleged negligence of the defendant, and the case came up on a demurrer to the replication, so a case such as the instant one was not presented. Whether the then defendant was a private contractor or a utility at the place in question could make no difference in the result, and the holding that the defendant had no authority as a public utility to operate outside its limits was obiter. The instant case presents a situation in which we should examine anew whether or not this village can devote its surplus to public use outside its limits, and if it has so devoted it. Unless it can and has, it cannot be compelled to furnish electric energy to the petitioner under § 6452 or Chap. 250 (§ 6084 et seq.) of the Public Laws, for to do so would be a vain attempt to convert a private contractor into a public utility. This case in 108 Vt. 242, 251, 15 P.U.R. (N.S.) 428, 184 Atl. 881.

So far as here material P. L. § 6452 reads: "A person, association, company, or corporation engaged in the business of generating in this state electric energy and distributing the same for general sale for heating, lighting, or power purposes, or for any other public use, if and when requested so to do, at all reasonable times, shall sell and distribute the same to any and all persons . . . that desire to use the same within this state for either or any of such purposes; subject, however, to such reasonable limitations as to the amount of energy to be furnished a purchaser, and which shall in no case be beyond what is reasonably necessary, and also as to the distance from the generating plant or from its lines of transmission that such energy shall be delivered," etc. Under §§ 6454 to 6456 and Chap. 250 of the Public Laws jurisdiction in such matters is given to the Public Service Commission.

We held in Rutland R. Light & P. Co. v. Clarendon Power Co. (1912) 86 Vt. 45, 56, 83 Atl. 332, 44 L.R.A. (N.S.) 1204, that in the absence of charter limitations, a corporation which engages in the business of generating and distributing electric energy for general sale for power purposes devotes its property to a public purpose as much as if it limited its business to the sale of current for lighting purposes, and that such business is affected with a public interest, both as regards the law of regulation and the law of eminent domain. As stated in the opinion that holding puts all corporations engaged in generating electricity for general sale into one and

the same class, without regard to the presence or absence of special provisions in their charters regulating the conduct of their business.

On p. 50 of 86 Vt., 83 Atl. on p. 334, this opinion comments upon Professor Wyman's then recent work on Public Service Corporations and says that "he makes the whole question of public use, or what is the same thing, public calling, depend upon whether the calling involves a matter of public necessity and is monopolistic in character, in view of the economic, industrial, and commercial condition of the times. Taking monopoly as the criterion by which a given calling is to be tested, he determines its character as public or private, and classifies it accordingly. He divides monopolies into three classes: Natural, state granted, and virtual. And his conclusion is that when one engages in a business which is fairly assignable to either of these classes, his business becomes affected with a public interest, and the rights of the public therein may be protected by legislative action, and the conduct of the business regulated accordingly. That a business purely private is not subject to such regulation is plain enough. It is only when the public has an interest in it that it has any rights to be so protected. Nor is the situation changed (according to Professor Wyman's theory) if that business, for one reason or another, becomes locally or temporarily monopolistic, as where a local merchant for the time being controls the whole available supply of a given commodity, it is still a private enterprise, and (in the respect now under consideration) free from legislative regulation or control. On the other hand, a public calling may become locally, or temporarily, competitive, as where two railroads come to serve the same territory; but such do not thereby lose their character as public service corporations, and they remain subject to regulation and control." Munn v. Illinois (1877) 94 U. S. 113, 24 L. ed. 77, is cited as based upon this theory, and it is said that this theory affords a test of public use at the same time, logical, workable, and satisfactory so far as the matter of regulation is concerned.

In Munn v. Illinois, *supra,* 94 U. S. at p. 126, it is said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." This often cited case concerned the transacting of business as public warehousemen. In support of the conclusions there reached the opinion quotes from a number of authorities, including Allnutt v. Inglis (1810) 12 East, 527, and from the extracts therefrom we quote the following: By Lord Ellenborough: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a mo-

nopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." And by LeBlanc, J.: "Then admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and if so, the principle of law attaches upon them."

The case of New York & Chicago Grain & Stock Exch. v. Chicago Board of Trade (1889) 127 Ill. 153, 19 N. E. 855, 2 L.R.A. 411, 11 Am. St. Rep. 107, cites the quotation first above taken from Munn v. Illinois, *supra,* in support of its conclusions. In that case it was held that the Chicago Board of Trade cannot, after having so conducted its affairs for a long term of years as to create a standard market for agricultural products, and in concert with telegraph companies built up a system for the instantaneous and continuous indication of that market, until such system has become impressed with a public interest, be allowed to discriminate between persons, and say that one shall and another shall not receive the market reports, when all are equally willing to conform to reasonable rules on the subject and pay for the information.

[2] In determining if a corporation is a public utility the important thing is what it does, not what its charter says. Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 S. Ct. 583, Ann. Cas. 1916D, 765.

[3, 4] Under our statutes and the foregoing authorities it is clear that if a private corporation were doing what is alleged, it would be properly classed as doing a business subject to regulation by the Public Service Commission. We have here a case where the petitionee has a virtual monopoly in the distribution and sale of electricity in a large part of Lamoille county, and where, if it has the power, it has dedicated its surplus to the public use. It generates its electricity by water power and has more than a temporary surplus. Even if it has overbuilt is no reason why it should let its surplus power go to waste. We are faced with an unusual situation where over the years a municipality has built up a profitable business in selling large quantities of electric energy outside its limits, and we can see no reason why this large surplus may not be devoted to the public use until such time, if ever, that the needs of the inhabitants of the municipality require all of the electric energy generated. To assure an adequate market for all of its surplus it may have been good business practice to supply all who require electric energy in this large territory, both for the purpose of selling as much energy as possible, and for the purpose of preventing competitors from entering the territory and taking business which the petitionee was prepared to handle. So long as it serves and monopolizes this territory it should not be permitted to discriminate between those desiring such service. Because it has no special legislative authority to dispose of its surplus outside its corporate limits entitles it to no spe-

cial favors. It cannot take the advantages without assuming the liabilities usually incident to such operations.

As further showing that the petitionee has dedicated its surplus to public use outside its corporation limits, the amended petition alleges that the petitionee has furnished to the Public Service Commission information required under P. L. § 6088, concerning the condition, operation, management, expense of maintenance and operation, cost of production, rates charged for service or for product, contracts, obligations, and financial standing of the corporation, at various times during the past ten years or more; that through its manager it has notified the Commission of the happening of accidents within the state upon its lines and plant, pursuant to P. L. § 6089; that it has complied with P. L. § 6100, and filed with the Commission from time to time as required by its schedules open to public inspection showing all rates, including joint rates, for any service performed or any product furnished by it within the state, and as part thereof, filed the rules and regulations that in any manner affect the general public, or rates charged or to be charged for such service or product; that, as provided by P. L. § 6102, it has kept and now keeps on file in every station or office where payments are made by consumers or users thereof, open to the public, and in such form or places as to be readily accessible to inspection by the public, copies printed in plain type of so much of its schedules as the Commission has deemed necessary; that it has, from time to time, applied to the Commission for permission to construct, maintain, and operate power lines in order to convey electric energy to various places outside of its limits, to run its power lines in the highways and across the highways, to connect its power lines with the power lines of other villages and public utilities, and that it has particularly applied for and received permission to construct, maintain, operate, and connect its power lines and equipment outside its limits on six occasions, the places and dates being specifically enumerated, all between 1918 and 1928; and also that applications and permits to construct and maintain wires in other places outside its limits were made and issued from time to time.

[5] The sections of the Public Laws above cited are a part of Chap. 250, and their provisions only apply to those subject to supervision under that chapter. By § 6085, a part of that chapter, the Public Service Commission is given supervision of all those, including municipalities, engaged in the manufacture, distribution, or sale of electricity directly to the public, or to be ultimately used by the public, for lighting, heating, or power, including supervision of their use and occupancy of the public highways. This section further provides that in the case of those whose principal business is other than the manufacture, distribution, or sale of electricity directly to the public, or ultimately to be used by the public, for lighting, heating, or power, they shall be under the supervision of the Commission only as to that part of their business which has to do with such manufacture, distribution, or sale of electricity. So far as the manufacture, distribution, or sale of electricity

for use within the petitionee's corporate limits are concerned, this section gives the Commission supervision, but if, as it contends, it is doing a private business outside, it is not subject to supervision as to that part of its business. Yet, the foregoing allegations are sufficiently broad to show that it has treated this part of its business as also subject to supervision, and so tend to show it has dedicated that business to the public use. Palermo Land & Water Co. v. Railroad Commission (1916) 173 Cal. 380, P.U.R.1917A, 447, 160 Pac. 228.

Because of what we have already pointed out it is unnecessary to comment upon the other allegations in the amended petition, nor need we determine if the allegation that the petitionee since the enactment of the provisions of P. L. § 6453 has erected and maintained a transmission line for a distance of approximately 625 feet along and in the public highway in the town of Elmore avails the petitioner anything.

Order affirmed and cause remanded. Let the result be certified to the Public Service Commission.

MONTANA PUBLIC SERVICE COMMISSION

Re Big Horn Oil & Gas Development Company

[Docket No. 2548, Report and Order No. 1736.]

Return, § 9 — Basis — Present value of property.

1. A utility is entitled to earn a fair and reasonable return upon the present value of its property used and useful in the public service, p. 43.

Return, § 10 — Book value basis — Dividends — Depreciation fund.

2. A utility cannot pay dividends out of its depreciation and replacement fund and at the same time claim a return based upon its book value, p. 43.

Valuation, § 85 — Accrued depreciation.

3. Depreciation should always be considered in determining the value of utility property for rate-making purposes, p. 43.

Rates, § 120 — Reasonableness.

4. A gas customer need pay only a reasonable rate, p. 45.

Depreciation, § 14 — Basis — Actual value.

5. The allowance for depreciation should be based upon the actual value of the property and not upon its original cost or upon the gross revenue of the utility, p. 46.

Depreciation, § 26 — Method of determining — Past practices.

6. Depreciation should always be figured at the rate which is continuing and at no time should it be fixed in order to remedy excessive rates of depreciation which were in effect in the past, p. 46.

Expenses, § 45 — Director's fees — Reasonableness.

7. A director's fee is a proper item of operating expense but should not be unreasonable, p. 46.

Commissions, § 11 — Duties.

8. It is the Commission's duty to protect not only the utility but also its patrons, p. 46.

Commissions, § 43 — Duties — Approval of rates — Rules and regulations — Accounting practices.

9. It is the Commission's duty not only to approve or disapprove utility rates but also to see to it that the utilities conform to the Commission's rules and regulations and adhere to proper accounting practices, p. 46.

[November 16, 1938.]

APPLICATION *for approval of gas rate increase; denied.*

APPEARANCES: C. C. Guinn, Attorney, Hardin, for the Big Horn Oil & Gas Development Company; Dan W. Maddox, City Attorney, Hardin, for the consumers; John W. Bonner, Counsel, Helena, for the Commission.

By the COMMISSION: The applicant in this case heretofore filed a petition with this Commission to increase its gas rates for gas furnished to its consumers in Hardin, Montana. The present rates as compared with the proposed rates are as follows:

	Present Rate	Proposed Rate
First 6,000 cu. ft.	40¢	50¢
Next 4,000 " "	32¢	50¢
Next 40,000 " "	32¢	40¢
Next 50,000 " "	32¢	38¢
All additional " "	26.4¢	36¢
Minimum bill	$1.50	$2.00

The petitioner furnishes gas to its patrons in Hardin, Montana, for both domestic and commercial purposes. The utility was organized in 1928 and began business in 1929. The evidence shows the book value of the utility to be $153,011.14 and at the time of the hearing the utility had 268 consumers. It should be noted that the utility has gas wells of its own whose value is included in the book value just referred to. It appears from the evidence that from 1930 to 1936 the utility made a return of $11,284.82 on its investment. Its depreciation reserve fund totals $57,293.12 and depreciation is figured at 10 per cent. Dividends have been paid by the utility at the rate of 4½ per cent, even though the books of the company show that it has not been making a reasonable return on its investment. It is interesting to note that in this regard the accountant for the utility in his report for the year 1934 advised the directors of the utility as follows:

"As it is disclosed in the checking of the dividends paid during 1934 caused an overdraft of your surplus account. Your attention is drawn to the fact it is illegal to pay dividends except from surplus earnings. I suggest that in the future you liquidate all your liabilities before paying another dividend and then if your surplus from earnings is not adequate and you have the funds in your reserve accounts that you declare liquidating div-

idends instead of dividends from earnings."

It should be noted that in addition to the regular operating expenses of the utility that its seven directors meet once a month or oftener. During 1936 these directors drew $1,614.50 in addition to the manager who received $1,936.80 and the superintendent who received $1,367.47. It should be further noted that the evidence discloses that while the utility has set up a depreciation reserve over a period of years that this reserve exists on paper only and is entirely depleted. No money has been set aside for repairs or replacements and the truth of the matter is that the utility now finds itself in a depleted financial condition and asks for this increase in rates in order to procure sufficient funds to make repairs and replacements in order that it may efficiently operate.

The evidence discloses that the total operating expenses including salaries, total $19,732.56 for 1936, and its revenue for this year amounted to $22,013.50. In 1937 the total revenue amounted to $25,396.51 and the operating expenses, $24,250.85. The utility in its operating expenses has included interest on its bonded indebtedness and on its unpaid obligations because of extensions to the plant and current needs. The amount of depreciation shown in the Depreciation Reserve Account of the utility for the year 1936 is $57,293.12 and in 1937 this reserve amounted to $66,475.05.

Prior to March 25, 1935, the utility charged a higher rate to its customers than it now does. This is so because the utility of its own accord asked that its rates be reduced to their present level and the request was approved by this Commission on March 20, 1935, and became effective on that date. It must be presumed at the time of such rate reductions that the utility felt it was making a reasonable return on its investment.

We do not believe it is necessary to set out in detail all of the pertinent evidence introduced at the hearing. However, we must point out that the utility did not attempt in any way to give us the present value of its property used and useful in the public service. The utility was content to rely on its book value only for the purpose of showing that it needed the additional revenue which would accrue if we approved the proposed rates.

[1] We have heretofore held that a utility is entitled to earn a fair and reasonable return upon the present value of its property, used and useful in the public service. Re Billings (1938) 31 M. U. R. —, 23 P.U.R. (N.S.) 442; Re Horning (1938) 31 M. U. R. —, 24 P.U.R.(N.S.) 462; Miles City v. Montana-Dakota Utilities Co. (1938) 31 M. U. R. —, 26 P.U.R.(N.S.) 358; Consumers v. Saltese Electric Light & Water Co. (1938) 31 M. U. R. —, 26 P.U.R. (N.S.) 333; Customers v. Kevin Gas Distributing Co. (1938) 31 M. U. R. —, 26 P.U.R.(N.S.) 327.

[2, 3] We do not deem it necessary to go into the present value of this plant since we believe that its operations have been for the most part so inefficiently carried on that no one could ascertain the true conditions of this utility until it has adhered to the established practices of utilities and recognized utility accounting. The depreciation reserve of this utility has

not been used for the purpose intended. Over a period of years this utility has been collecting rates from its customers and these rates have been approved by us for the reason that they were thought adequate in order that a portion of them be used by the utility for replacements and depreciation. This utility has paid dividends to its stockholders and the money so received by them was money that should have been kept in the depreciation and replacement fund. Certainly the utility cannot so use this money and at the same time claim a return based upon its book value. Depreciation should be considered in all cases. As we said in Re Horning, *supra,* at p. 472, of 24 P.U.R.(N.S.):

"At any rate it is hard to see, in any case, where it can be claimed that property has not depreciated when the utility at the expense of the ratepayers has made provision for depreciation and when depreciation is provided for, it should be used for the purpose intended. As the Supreme Court has said, referring to depreciation: 'It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating, and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders.' Louisiana R. Commission v. Cumberland Teleph. & Teleg. Co. (1909) 212 U. S. 414, 424, 53 L. ed. 577, 29 S. Ct. 357. While we do not adhere to any set rule as to how depreciation should be considered, in any case, we do adhere to the rule that it should be considered in light of all the evidence introduced in each particular case within the sound judgment of the Commission."

Here the utility is asking us to consider the interest on its bonded indebtedness and unpaid obligations for extensions to its plant in determining a reasonable rate to be charged by the utility under consideration. We said in this regard in Re Thompson Falls (1938) 22 P.U.R.(N.S.) 337, 341:

"In this case, we are faced at the outset with the question of whether or not the patrons of any utility should be required to pay a rate sufficient to enable the utility to pay for its water system which has been constructed with borrowed capital for the most part. We must, at all times, be on the lookout against discrimination, both as against the utility and as against its patrons. The present application would appear to have the rates increased for the sole purpose of relieving the taxpayers of Thompson Falls of many of the burdens incidental to property owning in a town which owns and operates a municipal utility.

"To allow a part of the bonded indebtedness for plant construction to be extinguished through rates, which, of course, includes interest on the indebtedness, appears to us as discriminatory against the patrons of the utility. For example, if the patrons of any utility were required to pay interest on the property investment of the utility such a policy would unreasonably injure the public and place an illegal burden upon it, which it should not have to carry. The money borrowed must be treated as money owned by the town and the public, therefore, is not required to pay for the use of it. This same principle would apply in this case, in that a patron of a utility

is not required to pay through rates the amount expended by the utility for its plant. Oklahoma Nat. Gas Co. v. Corporation Commission (1923) 90 Okla. 84, P.U.R.1924A, 132, 216 Pac. 917."

[4] Since the utility in this case has not used its funds for the purposes intended by law and now wants to increase its rates in order to secure funds to repair its plant and put it in shape for efficient operation, we are faced with the question as to whether or not we should approve the rates solely for this reason. A gas customer need only pay a reasonable rate. In a case which was almost identical with the one here and which involved a water utility, we said:

"The water consumer need only pay a reasonable rate. Here the water consumer is forced to pay a rate which will give the city a fair return on its investment, pay for the operation of the water department, contribute to reserve funds, which are not used as contemplated by law, and, in addition, contribute capital for the construction and betterment of the water system. And this is not all. By contributing capital for the construction and betterment of the water system, the consumer is penalized, since the city is requiring him to do something that he is not required to do by law, since he is, in fact, required to pay interest on his own money. Furthermore, when a part of the rate charged the consumer is placed in the depreciation account of a utility, this account should be used for the purpose stated. The consumer, under such circumstances has the right to assume that that account is for depreciation and that the utility will not divert it to any other purpose and when the life of the plant expires, ask the consumer to pay a higher rate than is reasonable in order to construct the plant anew. As is well stated in Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 13, 53 L. ed. 371, 29 S. Ct. 148:

" 'A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued, the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment

unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past.'" Re Billings (1938) 31 M. U. R. —, 23 P.U.R. (N.S.) 442, 453.

[5, 6] Whether or not this utility should be allowed depreciation on its property at the rate of 10 per cent cannot be ascertained at this time. The allowance for depreciation should be based upon the actual value of the property and not upon its original cost, as here, or upon the gross revenue of the utility. We feel that the amount to be determined for depreciation is not covered by any fixed rule, but can only be determined after careful examination of the property and the nature of its use. The past experience of the utility in this regard should be taken into consideration. In determining what rate of depreciation should be used, the means employed by an accountant is not in itself sufficient since at no time should the rate determined for depreciation result in the accumulation of a surplus beyond the reasonable requirements of the utility. At all times depreciation should be figured at the rate which is continuing and at no time should it be fixed in order to remedy excessive rates of depreciation which were in effect in the past.

[7] While it is ordinarily held that a director's fee is a proper item of operating expense (New York & Richmond Gas Co. v. Prendergast, 10 F. (2d) 167, P.U.R.1925E, 19, P.U.R. 1926B, 759), nevertheless we do not believe that director's fees should be unreasonable. It should be remembered that the business of the utility is for the benefit of its stockholders and it is they who are entitled to a fair return on their investment. To allow a stockholder an unreasonable fee is to give him more than a fair return on his investment. To this he is not entitled. Here the utility pays salaries for taking care of and managing the utility. There is no reason why the directors should meet once or twice a month and charge the utility for their services. It has been held that the directors of a utility whose operating expenses amounted to $13,436 were only entitled to $200 per year. Minersville v. Minersville Water Co. (Pa.) P.U.R.1926E, 147. We believe that the directors in this case should not be allowed over $300 per year and we ask that the utility abide by this decision since we will not consider or allow a higher sum for this item in its operating expenses.

[8, 9] The affairs of this utility are in such shape that we cannot in all justice, grant the rates which it requests in the present application. We deem it our duty to protect not only the utility but its patrons as well. Before a utility should be allowed an increase in rates it should at least have its house in order so that we could determine with reasonable accuracy as to whether or not the rate increases should be approved and allowed. In our opinion the rate and the manner of charging depreciation by this utility is wholly unreasonable. Our duty is not simply to approve or disapprove utility

rates but we must also see to it that the utilities conform to our rules and regulations and adhere to proper accounting practices. Only in this way can we properly regulate the practices of the utility for its own interests and the interests of its patrons.

We believe that this utility should immediately begin operating in accordance with our rules and regulations and in accordance with the laws pertaining to its operations. We venture no prophecy now, without absolute compliance by the utility with our rules, as to whether its existing gas rates will continue to be reasonable.

For the reasons herein stated we must refuse to approve the petition of the Big Horn Oil and Gas Development Company for an increase in its gas rates heretofore stated and require the utility to follow the law and adhere to our rules and regulations as well as to follow our Uniform Classification of Accounts for Gas Utilities and inaugurate a definite policy as to proper distribution of charges between maintenance, operation, depreciation, capital accounts, etc.

An appropriate order will be entered.

SECURITIES AND EXCHANGE COMMISSION

Re Indiana General Service Company

[File No. 32-103.]

Mortgages, § 9 — Trustees — Conflict of interests.

1. The contemporary system of corporate finance can function efficiently and justly only if trustees under debenture indentures are free from interests which conflict with their responsibilities under such indentures, and only if they conduct themselves with an alert consciousness of such responsibilities, p. 49.

Mortgages, § 9 — Trustees — Responsibility.

2. The responsibility of a trustee under a bond indenture begins not merely from the time that the indenture is executed but during the drafting stages, p. 49.

Mortgages, § 9 — Trustees — Conflict of interests.

3. A trustee under a bond debenture should be disqualified if for any reason the trustee is in a position in which duties, interests, or loyalties may tend to interfere with the performance of its obligation to use its best effort to see that provisions relating to maintenance, depreciation, additional issues, and sinking funds are drafted in the interest of the prospective holders of securities issued under the indenture, p. 49.

Mortgages, § 9 — Trustees — Conflict of interests — Duties to parent corporation and subsidiary corporation bondholders.

4. The Commission cannot say that there is not a substantial conflict of loyalties disqualifying a corporate trustee from being trustee for a bond

indenture of a subsidiary corporation and also trustee for the debentures of a parent corporation; the trustee might find it embarrassing because of its relationship to the parent corporation debenture holders to take action which would impede the flow of earnings on stock to the parent corporation, but as trustee for the subsidiary corporation bonds it might be its duty to see that provisions are inserted in the indenture which will build up a protective cushion for the bonds and by the same token result in less earnings being available for dividends, while other conflicting loyalties detrimental to the interests of investors might result from the duty to supervise the performance of covenants in the indentures and from possible future reorganization, p. 49.

Mortgages, § 9 — Trustees — Conflict of interests — Effect of corporate financial condition.

5. The fact that both a parent corporation and a subsidiary corporation are in unusually strong financial condition does not warrant or excuse a departure from sound financial principles with respect to the avoidance of conflict of interests resulting from a corporate trustee being trustee for bondholders of both of the corporations, p. 51.

Mortgages, § 9 — Trustees — Potential conflict of interests — Intention to resign.

6. An assertion by a corporate trustee that it would resign in the event that an actual conflict should arise between bondholders of a parent corporation and bondholders of a subsidiary corporation, if it acts as trustee for both groups of bondholders, would not justify approval of the trustee acting under both bond indentures, p. 51.

[November 25, 1938.]

HEARING *on question of conflict between interests or obligations of trustee under two bond indentures; finding that there is no substantial conflict refused.*

By the COMMISSION: Indiana General Service Company, a corporation organized in the state of Indiana and a subsidiary of American Gas and Electric Company, a registered holding company, filed an application and amendment thereto for exemption from the provisions of § 6(a) of the Public Utility Holding Company Act of 1935, for the issue and sale by it of $6,500,000 principal amount of its first mortgage bonds, 3¼ per cent series, due August 1, 1968.

Pursuant to the terms of a mortgage and deed of trust, dated August 1, 1938, the Guaranty Trust Company of New York was named trustee. The Guaranty Trust Company of New York is also trustee under the debenture indenture of the parent company, American Gas and Electric Company.[1] The Guaranty Trust Company in a letter to the Securities and Exchange Commission dated September 29, 1938, agreeed that it would resign as trustee under the Indiana General Service Company's mortgage and deed of trust within sixty days after the issuance and sale of the first mortgage bonds, unless prior to the expiration of such sixty days it was advised by the Commission that in the opinion of

[1] $40,000,000 outstanding as of August 31, 1938.

the Commission there is not such a substantial conflict between the interests or obligations of the Guaranty Trust Company under the two indentures as to require its resignation in one capacity. At the same time it requested an opportunity to file a brief and present oral argument on the question of whether there is any such substantial conflict. Thereafter, the Commission made and filed findings [2] with respect to the amended application of the Indiana General Service Company and on October 3, 1938, issued its order giving Indiana General Service Company the exemption which it sought. The Commission also granted Guaranty Trust Company's request for a hearing, and arguments were heard.

We have carefully considered the arguments advanced by Guaranty Trust Company and by counsel to the Commission relating to the issue raised by the agreement of the Guaranty Trust Company. Under the provisions of §§ 6(b) and 7 of the act, we are charged, among other things, with a general responsibility to see that the terms and conditions of security issues subject to those provisions, are such as to protect the interests of investors. It is in light of this responsibility that we have considered the present issue.

[1] In part 6 of the report of this Commission on its study of protective and reorganization committees, we stated at length our conception of the duties and responsibilities of trustees under indentures. It is our view that the contemporary system of corporate finance can function efficiently and justly only if such trustees are free from interests which conflict with their responsibilities under the indenture, and only if they conduct themselves with an alert consciousness of such responsibilities.

We can best determine the existence and significance of the dual capacity of the Guaranty Trust Company in this situation by pointing out a few of the critical periods in the life history of securities issued under indentures.

[2–4] As we have elsewhere pointed out,[3] the interests of security holders are profoundly affected by the nature and relationships of the parties that participate in the drafting of the indentures. We have stated that in our opinion, the trustee's responsibility begins, not merely from the time that the indenture is executed, but during the drafting stages.

"A trustee who is chosen to represent the interests of those who are asked to purchase a new issue of bonds might well be expected to exercise an alert and active interest in the welfare of those bondholders from the earliest stages of the proceedings. The greater parts of the protection accorded to such bondholders is prescribed by the terms of the instrument which sets forth the rights of the holders of the bonds in the event that default should occur. It is unlikely that a trustee will ever find a better opportunity to protect the interests of those security holders than at the time of the formulation of the trust instrument which is to fix the rights and the duties of the respective parties." [4]

At this stage, the content of such

[2] Re Indiana General Service Co. (1938) — S. E. C. —.

[3] Re Kansas Electric Power Co. (1936) 1 S. E. C. 891, 16 P.U.R.(N.S.) 337.

[4] Re Kansas Electric Power Co. *supra*, at p. 341 of 16 P.U.R.(N.S.).

provisions as those relating to maintenance, depreciation, additional issues, and sinking funds are forever fixed; and it is the trustee's duty to use its best efforts to see that provisions such as these are drafted in the interests of the prospective holders of securities issued under the indenture. If, for any reason, the trustee is in a position in which duties, interests, or loyalties may tend to interfere with the performance of this obligation, the trustee should be disqualified. In the present situation, the Guaranty Trust Company is trustee for the bond indenture of the Indiana General Service Company; it is also trustee for the debentures of Indiana's parent, American Gas and Electric Company. American owns all of Indiana's common and approximately 60 per cent of its preferred; the earnings on these stocks constitute in part the source of interest and principal payments on the American debentures for which Guaranty is trustee.

Guaranty, therefore, might find it embarrassing because of its relationship to American debenture holders to take action which would impede the flow of earnings on Indiana preferred and common; but as trustee for the Indiana bonds, it may very well be its duty to see that provisions are inserted in the indenture (e. g., with respect to maintenance) which will build up a protective cushion for the bonds and by the same token result in less earnings being available for preferred and common dividends.

It seems clear to us that the Guaranty should not be placed in this position of conflicting loyalties; and it is quite clear to us that we cannot say that this is not a substantial conflict.

As we project the life history of the Indiana bonds, other important instances appear in which the conflicting loyalties of Guaranty may be most embarrassing to it and detrimental to the interests of investors. Both the Indiana bond indenture and the American debenture indenture are in conventional form. The trustee has very few duties under these indentures. Nevertheless, it does have important powers which it may exercise, in its discretion, for the benefit and protection of the security holders thereunder. It is not obligated to exercise these discretionary powers, but it is obligated to determine whether or not it should exercise them. For example, it has the power to exercise general supervision over the performance of various covenants in the indentures. A situation may arise in which such supervision by Guaranty as trustee under the Indiana bond indenture may result in impeding the flow of earnings to service the American debentures. Presumably, no remedy would be available to the Indiana bondholders because of Guaranty's failure to exercise such supervision, both because of the provisions of the indenture and because of the broad exculpatory clauses [5] with which the indenture is studded. The Commission has taken no action in the instant case to require elimination of these exculpatory clauses or to require that more exacting du-

[5] By the terms of the American Gas and Electric Company debenture indenture the trustee is not liable except for "gross negligence or wilful default." By the terms of the Indiana General Service Company first mortgage and deed of trust the trustee is not liable except for "its own negligence or bad faith." In connection with specific provisions of both indentures, specific exculpatory clauses appear in addition to these general clauses.

ties be placed upon the trustee. In this situation, it is not too much to expect that, as a minimum, the trustee under the Indiana bond indenture should be free from any conflicting loyalties which would make performance of its obligations difficult or embarrassing.

An even more serious conflict may arise in the event of reorganization of the Indiana General Service Company. Trustees under indentures have played an increasingly active part in corporate reorganizations, and the Commission has itself urged that trustees should take active steps in connection with reorganization.[6] In this case it would be difficult and embarrassing for the Guaranty Trust Company to participate actively in any reorganization of Indiana General Service Company. If it participates in any reorganization, it must do so as an advocate of the interests of the Indiana General Service Company bondholders. In so doing it may be asserting claims competitive with, and antagonistic to, those of the common and preferred stockholders of Indiana General Service Company. Consequently, if it participated in the reorganization as trustee under the Indiana General Service Company bond indenture, it may be asserting claims antagonistic to its interests as trustee under the American Gas and Electric Company indenture, because American Gas and Electric Company is the principal stockholder in Indiana General Service Company.

[5] It is urged by Guaranty Trust Company that both American Gas and Electric Company and Indiana General Service Company are in unusually strong financial condition. However that may be, the Commission feels that this fact does not warrant or excuse a departure from sound financial principles. Moreover, the principal purpose of the indenture and the indenture trustee is to provide for possible, in addition to probable, contingencies, since new issues of bonds are not ordinarily sold on the basis of prospective default. Potential conflicts of interest, therefore, deserve almost as serious consideration as actual conflicts.

The Commission is not persuaded by the numerous instances cited by Guaranty Trust Company of a trustee acting for both a parent and a subsidiary company under respective indentures heretofore executed and presently outstanding. This fact may be not so much evidence of the fairness and propriety of such a situation as of the pervasive character of the control heretofore maintained by holding companies over their subsidiaries—in the former's interest. Past unregulated conduct is no criterion of what presently regulated conduct in the interest of investors should be.

[6] Nor is the Commission persuaded by the assertion of Guaranty Trust Company that it would resign in the event that an actual conflict arose. The Commission does not concede that there is no present conflict. But even on the assumption that only potential conflicts exist, their presence consti-

[6] Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VI—Trustees under Indentures, 61, et seq. By the recently enacted Chandler Act, an indenture trustee is specifically given the privileges of (a) filing a petition proposing that a plan of reorganization be effected, (b) filing an answer to such a petition, and (c) filing claims for all holders of securities issued pursuant to the instrument, under which he is trustee, who have not filed claims. Bankruptcy Act, as amended June 22, 1938, §§ 126, 137, 198.

tutes a danger which should be eliminated.[7] Moreover, a trustee's position should be one of constant watchfulness and stewardship, the quality of which should remain unchanged throughout the duration of the trust. Financial difficulty is the result of a gradual process so that constant alertness of the trustee is demanded for the protection of the security holders. Consequently, it would be difficult, if not impossible, for the trustee to determine the earliest point when the conflict becomes material. Furthermore, history shows that corporate trustees have sometimes been guilty of belated resignations.[8]

For these reasons the Commission cannot find that there is no such substantial conflict between the interests or obligations of the Guaranty Trust Company under the two indentures as to require its resignation in one capacity.

[7] An excellent statement in this connection is found in Northampton Trust Co. v. Northampton Traction Co. (1921) 270 Pa. 199, 204, 112 Atl. 871, where the supreme court of Pennsylvania said: "It is not necessary to determine what conflicting claims may arise, either with regard to the extent, validity, terms of the mortgage, or application of income from the operation of the property; it is sufficient that they may well arise; and public policy requires, where controversies are brought into court, that each party should be represented by someone whose single object it is to secure all to which each party is entitled, unhampered by personal relations to an adverse party, who is bound in conscience to be a loyal and vigorous champion, without any obligation to a conflicting creditor or party."

[8] Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VI—Trustees under Indentures, 87, et seq.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION

Estate of Adelaide S. Browning

v.

Consolidated Edison Company of New York, Incorporated

[Case No. 9232.]

Service, § 162 — Formal approval of schedule — Effect on future Commission action — Submetering.

1. No finding in a case on complaint by a customer against a submetering restriction in an electric rate schedule may properly be based upon the prior action of the Commission in giving formal approval to a rate schedule containing such restriction, when the order of approval was made without prejudice to investigation, suspension, change, or rejection; such approval was not an approval of every provision therein contained, p. 54.

Rates, § 245 — Schedules — Effect of legal establishment.

2. The mere fact that a rate has been established in accordance with law

does not prevent the Commission from changing it; hence a complaint against certain provisions of a legally established rate schedule should not be dismissed because the schedule was legally established in compliance with the statute, p. 54.

Service, § 485 — Dismissal of complaint — Failure of proof — Duty of Commission — Submetering.

3. A complaint against a provision in a rate schedule prohibiting resale and submetering of electric energy should not be dismissed on the ground that the record does not justify a finding that the prohibition is unjustly discriminatory or unduly preferential, since the Commission does not sit as a judicial body merely to hear the testimony that is presented but has the duty to investigate and to determine after a thorough investigation every important and apparently deserving complaint, p. 54.

Discrimination, § 11 — Powers and duties of Commission — Submetering.

4. The Commission has power to set aside and annul any rule, practice, or regulation of any public utility which it considers unjust and unreasonable, and it is the duty as well as the power of the Commission to enforce the statutory prohibition against a public utility granting any undue or unreasonable preference or advantage or imposing any unjust discrimination, p. 55.

Discrimination, § 207 — Submetering prohibition — Customers' profit.

5. A customer submetering electric current is not properly differentiated from other consumers because he conducts the business to make a profit, p. 55.

[December 20, 1938.]

COMPLAINT against submetering prohibitions in electric rate schedule; hearing closed on ground that suitable case and suitable record has not been made to dispose of question.

APPEARANCES: Whitman, Ransom, Coulson and Goetz (J. H. Goetz), New York city, for the Consolidated Edison Company of New York, Inc.; Eidlitz, French and Sullivan (by Cornelius J. Sullivan), New York city, for the Estate of Adelaide S. Browning; Gay H. Brown (Harry M. Chamberlain, George E. McVay, Assistant Counsel, and Raymond J. McVeigh, Principal Attorney), for the Public Service Commission.

MALTBIE, Chairman: The complainant in this case desires to be billed under Service Classification No. 2, but to be allowed to sell to tenants electricity purchased from the Consolidated Edison Company. No question is raised as to the compliance of the Edison Company with the terms of the rate schedule duly filed and effective, but complainant virtually asks that the Commission direct the Consolidated Edison Company to strike from its rate schedule the provisions that any consumer supplied under Service Classification No. 2 may not resell and submeter the electric energy thus obtained. It is alleged that this restriction which does not apply to Service Classification No. 3 is arbitrary and unreasonable and should therefore be abolished.

Commissioner Van Namee in his memorandum rules against the complainant for the following reasons:

(1) The schedule now in effect has been approved by the Commission.

(2) The existing schedule was established by the company in compliance with the statute.

(3) The record does not justify a finding that the prohibition against submetering in No. 2 while permitting it in No. 3 is unjustly discriminatory or unduly preferential.

[1] The first reason is an incomplete statement of what was done when the rate schedule to which reference is made became effective. The Commission did allow the schedule to become effective on short notice, but specifically stated in the order that "said schedule is hereby approved without prejudice to investigation thereof, either upon complaint or upon the Commission's own motion and without prejudice to suspension, change, or rejection of the same as may be provided by law."

In an opinion in Case No. 8623 dated September 24, 1935, and approved by the Commission upon September 25, 1935 (10 P.U.R.(N.S.) 408, 409), I said regarding this matter:

"The Commission preferred to allow the rates to become effective without approval, but counsel advised that approval was necessary under the statute and the Commission, therefore, gave its formal approval but inserted the condition above noted, which is a clear intimation to anyone that such approval is pro forma and that the merits of any part of the schedule will be considered if the Commission is convinced that an investigation is necessary. This has been the practice of the Commission ever since the law was amended to require approval and it is generally understood by companies that the Commission must be free to consider any complaints that are made to it regarding any provisions of any schedule."

The provision in the order and the above opinion certainly serve notice upon everyone that the action taken was *not* an approval of every provision therein contained. As a matter of fact, the Commission has exercised the power reserved in the order itself and in the statute to make changes in the rates which became effective in the summer of 1935, of which the provision now complained of was a part.

No finding in this case may properly be based upon any prior action.

[2] The above facts also dispose of the second reason. If the rates had not been established as provided for by law, they would not now be in effect and the company would be collecting illegally the rates it has been charging. Further, the mere fact that a rate has been established in accordance with law does not prevent the Commission from changing it.

[3] The third reason is merely the Scotch verdict of "not proven." If the Commission were established merely to pass upon what is submitted to it, it might be proper to dismiss a complaint because the complainant had not proved his case. But the Commission does not sit as a judicial body merely to hear the testimony that is presented. It has a budget staff of nearly 400 employees which would be largely unnecessary if the Commission were acting as the usual judicial body. Its duty is to investigate and to determine after a thorough investigation every

important and apparently deserving complaint.

The question of the arbitrary prohibition against submetering has been before this Commission for some time and has not yet been determined upon its merits. To dismiss this case without attempting to determine the reasonableness of the arbitrary restriction against submetering is not to fulfill the purpose for which the Commission was created and for which it has been given such broad powers and a staff of engineers and accountants.

Commissioner Van Namee states that "The Commission has heretofore recognized the desirability of schedules which limit the profits of competitors with central station service and has approved classifications which were drawn for the express purpose of discouraging the practice of submetering." I know of no case since 1930 where this Commission has attempted through the establishment of schedules to limit the profits of central station competitors, and the legislature has not conferred upon this Commission any power so to do. It has been repeatedly ruled that those reselling and submetering current upon their own premises and using no street, avenue, highway, or public place are not under the jurisdiction of this Commission and that we have no power to regulate their rates and certainly not their profits.

As to the assertion that we have approved classifications drawn for the express purpose of discouraging the practice of submetering, it should again be remembered that whenever approval has been given of any schedule, an express provision has been included in the order stating that the Commission reserves the power of considering any provision in any schedule and of ruling that it is unreasonable, unjust, or in any way in violation of law. At least that has been the practice of this Commission for over eight years and the Commission has constantly exercised the power reserved to it.

[4] As to the suggestion that because electric corporations have been given general authority to establish classifications of service based upon "the purpose for which used," they are thereby authorized to arbitrarily prevent any consumer from taking service under a given classification because he resells, attention should be called to another provision in the statute which must be read in conjunction with every grant of authority to a public utility. This is the power granted to the Commission to set aside and annul any rule, practice, or regulation of any public utility which it considers unjust and unreasonable. The law also prohibits a public utility from granting any undue or unreasonable preference or advantage or imposing any unjust discrimination, and it is the duty as well as the power of the Commission to enforce these provisions of law.

Reading the statute in its entirety, it is clear that if an electric company undertook to differentiate its charges or refuse service upon the ground that the electricity sold were to be used for a specific purpose, the Commission has full authority to determine in that case whether the power had been unjustly and unreasonably exercised, and if it finds that such had been done, to require the company to cease the objectionable practices.

[5] Without attempting to decide

the fundamental question, which is not passed upon in the Commissioner's memorandum because no complete or adequate investigation has been made, it may be pointed out that because a submeterer conducts the business to make a profit, he is not properly differentiated from other consumers. Commercial and industrial consumers generally purchase electricity for the purpose of making a profit; that is why they are in business. The fact that one purchases electricity and various other commodities for the purpose of making a profit is no adequate reason for differentiating him from consumers who purchase electricity for their own amusement or comfort or enjoyment.

The submetering of electric current was not only invited but it was encouraged by electric companies in New York city. It has existed because of the spread between the wholesale and the retail rates. Landlords and others could buy electricity from the central station companies at one rate and sell it to their tenants at another rate, each being the rate of the central station companies, and still make a profit.

If the rates to various classes of users are just and reasonable, how can it be that the difference between the rates is so out of line with the difference in cost of service that a jobber may make a generous profit? The obvious solution would be to establish just and reasonable rates for each class of service and not to impose arbitrary rules to remedy a defect in the rate structure. If the Commission finds after a thorough investigation of its own that an arbitrary rule prohibiting submetering in certain classes of service while permitting it in others is just and reasonable, it has the power so to rule; but a finding should not be based upon an inadequate record in a case where the Commission has left to the complainant the obligation of establishing that a given rule is reasonable or unreasonable.

Lunn and Burritt, Commissioners, concur.

VAN NAMEE, Commissioner: Hearings in this proceeding were held at the New York office of the Commission, the last being held on January 13, 1938, 564 pages of testimony were taken and 36 exhibits received. Briefs and reply briefs were filed by both parties.

General Statement

This proceeding is based upon a complaint filed by the Estate of Adelaide S. Browning, which alleges that the Consolidated Edison Company of New York, Inc., has refused to bill the complainant, a submeterer, under Service Classification No. 2. Restrictions on submetering in Service Classification No. 2 were incorporated in the schedules filed by the Edison System companies effective August 1, 1935. The schedule of rates proposed at that time was expected to result in a reduction of some $7,000,000 annually and the additional revenue to be derived because of the restrictions against submetering, was an important element upon which the proposed rate reduction was conditioned.

Substantially the same questions presented in this proceeding were passed upon by the Commission in Case No. 8467 which covered a complaint filed by forty-one customers of New York Edison Company, Inc., and Brooklyn

Edison Company. One of the complainants in that proceeding is now reviewing the Commission's determination by certiorari (50 West 28th St. Corp. v. Public Service Commission and Consolidated Edison Company of New York, Inc.).

The Issues Involved

The real issue in this proceeding is raised by the complainant's claim to the right to submeter under Service Classification No. 2, even though that classification specifically prohibits the reselling or submetering of electricity. Also involved is the question as to the authority of the company to establish a classification in its rate schedule for the express purpose of restricting or eliminating submetering, and whether such a classification is unjustly discriminatory or otherwise in violation of law. No complaint has been made as to the reasonableness of the rate fixed in either Classification No. 2 or 3 which are the only ones affecting the complainant in the proceeding.

The Facts

Pursuant to an application accepted by the company on August 23, 1934, electric energy has been supplied to complainant's premises, Nos. 550–552 Fifth avenue, in the borough of Manhattan, under the provisions of Service Classification No. 2. When the Edison Company discovered that the complainant was submetering some of the service which was being supplied in accordance with Service Classification No. 2, it notified the complainant "that if such submetering practices were continued service could be supplied only under the terms and conditions of Service Classification No. 2." Because of the present restrictions against submetering contained in Service Classification No. 2, complainant can be properly billed only under the provisions of Service Classification No. 3 as long as it continues submetering to its tenants

Complainant's premises consist of an 8-story building with a penthouse. The ground floor and the basement of the building is occupied by Weber and Heilbroner, a tenant of the complainant, which has, since August, 1934, purchased its electricity directly from the Edison Company under Service Classification No. 2. The fourth floor and the eighth floor and penthouse were rented in the fall of 1936 to tenants, named Bertrand and Klein, respectively. The written leases with Bertrand and Klein (Exhibits 21 and 22) provide that "The landlord will furnish to the tenant electric service requisite for the tenant's enjoyment of the demised premises if the electric current necessary for such purpose shall be made available to the landlord at his expense by any public service company serving the part of the city where the building is located." The leases further provide that the tenant shall "pay the landlord as additional rent for such service in accordance with the amount of current consumed . . . at the prevailing rates from time to time charged for similar service by the public service company furnishing such current to the landlord." The leases also provide that the amount of current consumed is "to be determined by meter to be installed by the landlord," and that the amount of the bills rendered by the landlord for electric current shall be deemed to be additional rental.

The current consumed by the complainant's tenant is measured by three submeters, which are owned and maintained by the Electric Meter Company.

The Law Applicable to the Establishment of Service Classifications

Subdivision 5 of § 65 of the Public Service Law provides as follows:

"5. Nothing in this chapter shall be taken to prohibit a gas corporation or electrical corporation from establishing classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, or upon any other reasonable consideration, and providing schedules of just and reasonable graduated rates applicable thereto. No such classification, schedule, rate, or change shall be lawful unless it shall be filed with and approved by the Commission, and every such classification, rate, or charge shall be subject to change, alteration, and modification by the Commission."

Subdivision 14 of § 66 of the Public Service Law provides:

"The Commission shall have power to require each . . . electric corporation to establish classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and upon any other reasonable consideration, and to establish in connection therewith just and reasonable graduated rates and charges; and it shall have power, either upon complaint or upon its own motion, to require such changes in such classifications, rates, and charges as it shall determine to be just and reasonable."

History of Submetering

While the Commission is familiar with the efforts of the Consolidated System companies to eliminate or restrict the practice of submetering, a short résumé of its history may be helpful. Prior to 1931 no restriction against submetering was contained in any of the service classifications of the New York Edison Company which was the predecessor of the Consolidated Edison Company of New York, Inc., serving the territory wherein complainant's premises are located. On June 25, 1931, the New York Edison Company, Inc., introduced into its tariff its first limitation or restriction upon the practice of submetering. Service Classification No. 1 was at that time modified so as to provide that it was not available if the electricity purchased thereunder was to be resold by the customer or where meters not supplied by the utility were installed by or in behalf of the customer. On August 1, 1935, the New York Edison Company, Inc., restricted Service Classification No. 2 against submetering on and after November 1, 1935. Service Classification No. 2, as of August 1, 1935, specifically provided that any customer whose use of electric energy, for any 12-month period, was less than 75,000 kilowatt hours might dispose of such energy to any tenant or occupant of the premises served, provided that such energy was not resold, remetered, submetered, or made the subject of a separate charge. At that time, as at present, submetering was permitted on Service Classification No. 3, which was available to any customer guaranteeing the use of 75,000 kilowatt hours annually. A rider to said schedule permitted the inclusion of the consumption of any tenant of such customer in the 75,000 kilo-

watt hours which was required to be guaranteed. Effective February 1, 1937, the limitation of 75,000 kilowatt hours (which might be redistributed if no separate charge was made therefor) was removed from Service Classification No. 2 so that at the present time Service Classification No. 2 permits a customer to redistribute energy, without restriction as to quantity, if no separate charge is made therefor.

Discussion

The Commission has heretofore recognized the desirability of schedules which limit the profits of competitors with central station service and has approved classifications which were drawn for the express purpose of discouraging the practice of submetering. The law authorizes a utility company to adopt schedules which will avoid its prohibitions against unjust or unreasonable discriminations and will permit equality and uniformity of treatment. The purpose for which energy is to be used is specifically referred to Subd. 5 of § 65 of the Public Service Law as one of the considerations upon which a classification of service may be based. Where, as in this case, energy is used by one who submeters it must be purchased under Service Classification No. 3. Such a user is obviously different from one who supplies energy to tenants without making a specific charge therefor. The submeterer purchases the energy for the purpose of resale and is using it to make a direct profit. The landlord who submeters is engaged in the business of selling electricity as a commodity. The landlord who purchases current for his own immediate use or for the use of tenants, without specific charge therefor, is not using the energy for the purpose of resale. Whatever profit is made by such a landlord results from the rental of real estate and not from the sale of electricity. Separate classifications recognizing the distinction between the two types of use are justified by the statute.

Conclusions

The Commission has, under the provisions of the Public Service Law, approved the schedule of rates containing Service Classification Nos. 2 and 3. Each was established by the Edison Company in compliance with statutory requirements. The use now made of the energy by the complainant obliges the company to charge for the current consumed under the appropriate provisions of Service Classification No. 3. Nothing in the record justifies a finding that the applicable rate is unjustly discriminatory or unduly preferential. The complaint should be dismissed and an order entered closing the proceeding on the records of the Commission.

Brewster, Commissioner, concurs.

Note from Minutes of December 20, 1938

Memorandum by Commissioner Van Namee dated June 28, 1938.

Chairman Maltbie moved that the hearing be closed as not a suitable case and not a suitable record on which to dispose of this important question—whether the company should be allowed by arbitrary rules and regulations to permit the resale of electricity under some contracts and not under others:

Chairman Maltbie in the affirmative; Commissioners Lunn and Burritt in the affirmative concurring in Chairman Maltbie's memorandum; Commissioner Van Namee in the negative; Commissioner Brewster in the negative, concurring in Commissioner Van Namee's memorandum.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

J. Grover Henry

v.

Pennsylvania Edison Company

[Complaint Docket No. 11679.]

Service, § 163 — Rules and regulations — Necessity of filing.

1. Rules and regulations governing the conditions under which utilities shall be required to render service must be filed as part of the tariffs, p. 61.

Discrimination, § 17 — Charges — Rules and regulations.

2. Enforcement by an electric utility of rules and practices that require the payment by one customer of a greater sum than it requires of other customers for similar service under similar conditions constitutes unjust discrimination, p. 61.

Service, § 163 — Rules and regulations — Failure to file.

3. The failure of an electric utility to file with the Commission a booklet of "Service Rules," under which the utility asserts the right to make a charge to a customer for supplying 3-phase service for power purposes in excess of the cost of supplying single-phase service, is in violation of law, p. 61.

Discrimination, § 208 — Service — Electricity — Charge for 3-phase service.

4. A requirement by an electric utility that a customer pay part of the cost of facilities required by law to be furnished and maintained by the utility, representing the excess cost of furnishing 3-phase service for power over the cost of furnishing single-phase service, when the utility has supplied such service to other customers without requiring the payment of any amount of a similar character, constitutes an unreasonable and unjust discrimination, p. 61.

[January 3, 1939.]

INVESTIGATION *of charge by electric utility company for furnishing 3-phase service, not provided for in filed rules and regulations; rules and regulations ordered to be filed and refund to customer ordered.*

By the COMMISSION: On May 24, 1938, the Pennsylvania Public Utility Commission issued a rule against Pennsylvania Edison Company to show cause why it has not included in its filed tariff all its rules and regula-

tions as provided under Art. III, § 302, of the Public Utility Law, governing the rendering of service, also that Pennsylvania Edison Company has acted in a manner contrary to the provisions of Art. II, § 202(e) of the Public Utility Law and Regulation No. 3, adopted by the Commission June 18, 1938, and also to show cause why penalties should not be imposed for failure to comply with the provisions of the Public Utility Law.

[1–4] Hearing was held at which no testimony was taken, but by agreement of counsel a stipulation was made of record that the matter was to be submitted on briefs on questions of law. In its answer dated June 9, 1938, Pennsylvania Edison Company, hereinafter called "respondent," states it has rules and regulations affecting rates and tariffs, but denies it has failed to include all of its rules and regulations used in governing the supply of electric service. Respondent further states it has a printed booklet entitled "Service Rules"; that such booklet refers primarily to physical conditions surrounding service; that such "Service Rules" are not a part of any rate required to be filed under Public Utility Law, but denies that such "Service Rules" contain any rates of prices or any rules pertaining to same; that complainant had been receiving single-phase, 110-volt service for lighting; that to supply 3-phase, 220-volt power service required the installation of additional transformer capacity, 3-phase, 220-volt service wires from transformer to the premises and installation of a meter; that no extension to its lines was made; that the installation of the additional facilities does not constitute an extension under § 202(e) of the Public Utility Law and Regulation No. 3, requiring a certificate of public convenience, and that since the installation of these additional facilities did not come within the provisions of § 202 (e), respondent was released from the requirement for securing a certificate of public convenience under the exemptions provided by Regulation No. 3. Respondent's answer further states that § 202(e) violates the provision of the Constitution of the commonwealth of Pennsylvania and the provision of the Constitution of United States of America and violates the constitutional rights of respondent.

Since § 202(e) of the Public Utility Law was amended by the Act of Assembly, 1938 (Special Session) P. L. ——, approved the 28th day of September, 1938, which deleted that portion of said clause which dealt with extensions or improvements, that phase of the proceeding may be terminated without further discussion.

The cause of this proceeding was the refusal of respondent to supply 3-phase service for power purposes to the premises occupied by J. Grover Henry unless he paid to respondent the estimated cost to it to supply 3-phase service in excess of the cost to supply single-phase service, amounting to $93.50. The record shows application was made to respondent for electric service to operate two 2 horsepower each, one 3 horsepower and one 1 horsepower, a total of 8 horsepower 3-phase motors for use in connection with a bakery he was starting on the premises located about 2 miles east of Shippensburg. Electric service to the premises was being supplied through a 2-wire, 110-volt, single-phase service connection for lighting, installed some time in the past. Respondent refused

to accept the application for the supply of 3-phase service, except upon the condition that applicant make payment to it of the difference between the cost of installing facilities for 3-phase and the facilities for single-phase service estimated at $93.50. Respondent submitted no information in support of the reasonableness of its estimate of the amount of difference.

Respondent admits it has a printed booklet of "Service Rules" and regulations affecting rates and tariffs, but denies the said booklet contains any rates or prices or any rules pertaining to rates and prices and that all rules and regulations affecting or involving rates and tariffs are on file with the Commission. The tariff filed by Penn Central Light & Power Company, predecessor to respondent, in compliance with the Public Utility Law "Electric Tariff PSC Pa. No. 1, effective November 12, 1934" on "Original Page No. 4B" under "Definitions," par. 8, states as follows: "A booklet prepared for the use of architects, contractors, and builders setting forth methods of electrical installations and construction approved by the Penn Central Light and Power Company for use on its system. Copies may be obtained free upon request to the company, Altoona, Pennsylvania."

Rule No. 11, respondent's filed tariff, Original Page No. 4D, states as follows: "The company reserves the right to refuse the supply of service to single-phase, 110-volt motors of individual rating in excess of ¾ horsepower and to polyphase installations aggregating less than 5 horsepower."

Although § 401 of the Public Utility Law gives utilities, subject to the provisions of the act and the regulations and orders of the Commission, the right to have reasonable rules and regulations governing the conditions under which they shall be required to render service, nevertheless, said rules and regulations must be filed as a part of the tariffs.

Respondent states in a letter (Commission Exhibit No. 1) regarding its practice in the application of the options reserved to itself in the unfiled booklet of "Service Rules" that: "We have qualified under § 2 by the use of the word 'may' because we have long since realized that such rules cannot be made definite and specific and meet all conditions of operation. However, in general, we have adhered strictly to the above basis of service but we have occasionally, due to conditions of facilities, made different arrangements."

The applicant will have a total of 8 horsepower with no motors larger than 3 horsepower. Respondent estimates to supply single-phase service would cost $106.16 and to supply 3-phase service would cost $199.66. Respondent further states: "It must be understood that if he decides to pay for the 3-phase service, we will not accept any responsibility for the supply of 3-phase service should he at some future time move to another location on our system."

Article I, § 2, of the Public Utility Law (66 PS § 1102) defines "Service" and "Facilities" as follows:

"(20) 'Service' is used in this act in its broadest and most inclusive sense, and includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their du-

ties under this act to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them."

"(10) 'Facilities' means all the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility: Provided, however, that no property owned by the commonwealth of Pennsylvania at the date when this act becomes effective shall be subject to the Commission or to any of the terms of this act, except as elsewhere provided herein."

Article III, § 302 of the Public Utility Law (66 PS §§ 1142) provides:

"Tariffs; filing and inspection.—Under such regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the Commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the Commission may prescribe."

Article I, § 2, of the Public Utility Law (66 PS § 1102) defines "tariff" and "rates" as follows:

"(22) 'Tariff' means all schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier."

"(19) 'Rate' means every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this act, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications, or contracts affecting any such compensation, charge, fare, toll, or rental."

Respondent's statement (Commission Exhibit No. 1) in support of its rights to have rules, of which the Commission has no knowledge, to be enforced or suspended by it as may suit itself, is subversive to the principle of regulation as contemplated by the Public Utility Law to prevent unreasonable injustice and intentional discrimination. Under respondent's practice, no one can know, not even respondent, as to what its decision in any particular case will be. The application by respondent of these unfiled rules is optional and not compulsory. Enforcement by respondent of rules and practices that require the payment by one customer of a greater sum than it requires of other customers for similar service under similar conditions, regardless of whether the total payments are made to respondent or divided be-

tween respondent and others, constitutes unjust discrimination. The record contains evidence admitted by respondent that service has been supplied to other customers, under conditions similar to those of applicant in this case, without requiring payments of the character as was required of applicant. Respondent had the right and could as well have exercised its option in applicant's interest in this instance as respondent admits it did exercise this same option in other instances. Applicant has no guaranty of security that should the same motors be moved to another location on respondent's system, where both single-phase and 3-phase service are available as in this case, he may not be required by respondent under its unfiled rules and regulations to make a similar payment for directly opposite reasons as stated by respondent in this case.

The Commission, in Miller v. Duquesne Light Co. (1936) 15 Pa. P. S. C. 265–269, 14 P.U.R.(N.S.) 47, 50, stated: "Respondent, in support of its position, refers to certain 'Electric Service Installation Rules which are not contained in its tariff on file with us. We can give no consideration to rules and regulations established by any public service company which have not been filed with us in conformity with Art. II, § 1, Par. D, and Art. III, § 1, Par. C of the Public Service Company Law."

The provisions of Art. II, § 1, Par. (d), and Art. III, § 1, Par. (c) of The Public Service Company Law, pertaining to rules and regulations, are substantially the same as those of §§ 2, Par. (19), 302, and 401 of the Public Utility Law.

Upon full consideration of the record, we are of the opinion and so find that the action of respondent, Pennsylvania Edison Company, is in violation of the provisions of §§ 302 and 401 of the Public Utility Law in that it has failed to file with the Commission as required by § 302, all of its rules, regulations, and practices involving the payment, charges, and rates demanded for service to be supplied its customers and that it has demanded and received from J. Grover Henry the sum of $93.50 for payment of part of the cost of facilities required under § 401 to be furnished and maintained by Pennsylvania Edison Company, that the requirement for payment by J. Grover Henry constituted an unreasonable and unjust discrimination against said applicant in that similar service under similar conditions has been supplied other customers without requiring the payment of any amount of a similar character; therefore,

Now, to wit, January 3, 1939, it is *ordered*: That the instant rule be discharged in so far as it relates to the addition of facilities by respondent without first securing approval.

It is *further ordered:* That the instant rule be made absolute in so far as it relates to the violation of Art. III, § 302, and Art. IV, § 401 of the Public Utility Law.

It is *further ordered:* That Pennsylvania Edison Company, respondent, forthwith file with the Commission as a part of its tariff, all rules, regulations, and practices in conformity with the provisions of the Public Utility Law.

It is *further ordered:* That Pennsylvania Edison Company forthwith make payment to J. Grover Henry the sum of $93.50, together with interest at the rate of 6 per cent per annum, from April 28, 1938, to date of payment.

Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

$7,500,000 Construction Program Planned by California Utility

SOUTHERN California Edison Company, Ltd., expects to spend $7,500,000 this year for construction activities, as against approximately $9,000,000 last year. During 1938, the company added approximately 130 miles of distribution lines to the system, bringing the total lines in service to 14,050.

The 1939 budget calls for expenditures of $4,357,552 for distribution lines, $1,029,907 for substation, $603,259 for transmission lines, $626,473 for hydraulic generating plants, and $275,807 for steam generating plants.

Silex Plans Unusual Exhibit at New York World's Fair

THE Silex Company, Hartford, Conn., is planning an exhibit of unusual design for the 1939 New York World's Fair.

Surrounded by the myriad colors of a modernistic rainbow, the Silex blue and green exhibit will undoubtedly be one of the most colorful spots in the North Food Building.

On an island display in the center of the exhibit, a giant reproduction of a Silex Glass Coffee Maker approximately 20 inches wide and 40 inches tall will attract much attention.

On the right and left wings of the exhibit classic columns, decorated in graduated shades of blue, rise to the ceiling. In each of these columns a circular show window dramatically focuses attention on a spot-lighted Silex Glass Coffee Maker.

All of the eight electric and six non-electric models in six different sizes for household use and the eight models in five different sizes for gas service and the seven models in five different sizes for electric service in the restaurant line, as well as the Silex Broiler and a new product—a coffee dispenser for both home and restaurant service—are displayed in glass enclosed cases around two sides of the exhibit.

Brilliant flood lights play on these models and illuminate the walls above the cases where hand colored photomurals in cool green and coffee brown depict the evolution of coffee making appliances from pre-Colonial days to the new model Silex Glass Coffee Makers.

Visitors to the New York World's Fair 1939 will have the opportunity of sampling coffee brewed in a Silex Glass Coffee Maker for a service bar curves along the third side of the exhibit.

"CP" Sales Plan Book Released

EYE-COMPELLING, sales-compelling suggestions for the Spring campaign of the "CP" gas ranges, are contained in the Sales Plan Book just released to 12,000 dealers and 2,000 leaders in the gas industry.

The book contains a complete merchandising plan for a Spring campaign, which is the first of four to be projected in the nation-wide promotion of the "CP" gas range during 1939 under the auspices of the Association of Gas Appliance and Equipment Manufacturers' domestic gas range sales ma

Proposed Silex New York World's Fair Exhibit

agement committee. The Spring campaign covers the months of April, May and June; the other three campaigns planned are: Summer campaign (July, August); Fall campaign (September, October); and Holiday campaign (November, December).

The literature is presented from "the merchants' point of view," embodying ideas from leading merchandisers of "CP" gas ranges in all parts of the country who were quizzed for specific suggestions on an effective 1939 program.

The three "pockets" in the portfolio are filled with vivid and practical literature—4-color bill enclosures, rotogravure bill enclosures and direct mail pieces, show room banners, de luxe 4-color mailing pieces, news releases, newspaper advertisements, radio spot announcements, and a 4-page folder offering display and sales helps. These take in a sound slide film, window display, "CP" Sales-Maker, and a Floor Demonstrator.

Trenchent phrases, action photos, and specific figures, embodied in this literature, show the utility company and the dealer how they can tune in (to the tune of actual dollars and cents) to the amazing returns the "CP" ranges already have brought about.

The literature, much of which speaks directly to the home-maker, emphasizes the exceptional merits of the "CP" ranges, and their 3-way savings: in time, in fuel, in food.

Much is made of the "mammoth selling opportunity" which lies ahead for appliance outlets in replacing the 9,000,000 old, antiquated stoves which need immediate replacement in that many homes. Twenty valuable suggestions for effecting the necessary dealer coöperation to accomplish this "job" are given.

Elaborate announcement is given to the "CP Ranger Club," an organization for "CP" gas range salesmen from coast to coast, to provide "uniform high standards of selling performance — and national recognition for outstanding achievement."

Rules and awards for this Club, which is open to everyone engaged in the sale of "CP" ranges, are fully described in the folder given over to this particular feature of the "CP" promotional campaign.

Kinnear 1939 Catalog Ready for Distribution

KINNEAR Manufacturing Company, Columbus, Ohio, has just issued their new 1939 catalog (No. 16-D-13).

The 1939 number, which incorporates several new items not carried in previous catalogs, contains detailed information on various types of doors manufactured by the Kinnear company.

Copies may be secured direct from the manufacturer.

General Electric Announces New Strip Heaters

A NEW line of strip heaters for operation at sheath temperatures as high as 1200 F. has been announced by General Electric. The new heaters are enclosed in porcelain-enamel steel casings so that they have the additional advantage of resisting rust and corrosion.

Not only are these new heaters more attractive in appearance than the conventional high-temperature strip heaters made with alloy-steel sheaths, but their first cost is lower. In offering more resistance to rust and corrosion, it is expected that the porcelain-enameled units will substantially reduce replacement costs in heavy-duty applications.

New Construction Planned

THE preliminary construction budget for 1939 of the public utility operating companies in the Standard Gas and Electric Co. system will total $22,396,320, according to a statement by William J. Hagenah, president of Public Utility Engineering and Service Corp.

This amount includes $2,528,833, which, it is estimated, will be carried over from the 1938 construction budget for expenditures on projects not completed during 1938.

A classified summary of the total preliminary budget of $22,396,320 indicates estimated expenditures in the electric departments of $17,309,192; gas departments, $3,260,385; and other departments, $1,826,743.

Raybould Fittings Described

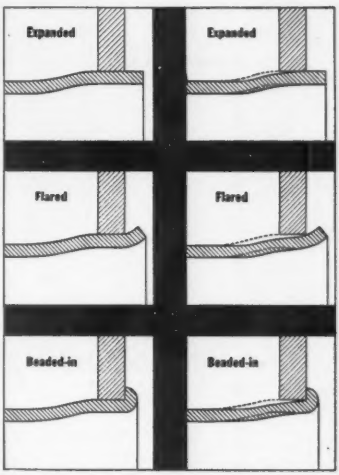
A NEW 12-page bulletin (No. M-700) illustrates and describes Raybould fittings and couplings for which the Pittsburgh Equitable Meter Co., Pittsburgh, Pa., are the sole distributors.

The following features of the Raybould coupling are stressed: (1) joins plain end pipe with no threading required; (2) only a wrench necessary to make a tight joint; (3) cathodic protection with every joint an electrical conductor; (4) flexibility—couplings absorbing all normal pipe movements; (5) slight deflections in pipe alignment or length compensated for; (6) makes every joint a union.

Why High Ductility is Vitally Important

(a) Jones & Laughlin Seamless Tubes with their high ductility form a smooth, tight joint and "stay put" permanently...when they are expanded, flared and beaded in. See diagrams below.

(b) Tubes not sufficiently ductile resist forming and tend to pull away from the boiler plate. Such tubes require longer time for working and leaveimperfect joints. See diagrams below.



J & L manufactures a complete line of seamless and welded steel tubular products. This includes seamless pressure tubes, condenser and heat exchanger tubes.

• • •

Flange steel plates and firebox steel.

e is why you get quick, easy installation, longer life and greater safety with

J & L SEAMLESS STEEL BOILER TUBES

en boilers get the shut-down habit, Jones & ghlin Seamless Steel Boiler Tubes will help get them back on the job in a hurry. Jones & ghlin Tubes roll in faster and then stay put. y keep your boilers working efficiently and economically because every length of Jones & Laughlin er Tubes has built into it an extra margin of ngth, safety and high ductility.

he dependable strength and durability of J & L es mean that boilers equipped with them stay on job longer and with fewer costly shut-downs.

he next time you need boiler tubes, call your es & Laughlin Boiler Tube distributor. You will tubes that are installed at a lower cost ... which longer... and you will get them just as quickly ou need them.

NES & LAUGHLIN STEEL CORPORATION

AMERICAN IRON AND STEEL WORKS
PITTSBURGH, PENNSYLVANIA

ERS OF HIGH QUALITY IRON AND STEEL PRODUCTS SINCE 1850

J&L Seamless Boiler Tubes

J & L—ALWAYS MAKING FINER CARBON STEEL PRODUCTS FOR NEW AND BETTER USES

Which one do You want?

LOOK OVER THIS GROUP of fine new "Eveready" on-the-job flashlights, specially designed to meet the special needs of oil men and electricians.

The new WATERPROOF Flashlights, 3354 and 3254, are *completely covered*, switch-and-all, with a soft rubber sleeve. Unbreakable lenses, chrome plated reflectors. Proof against hot wires, acids, gasoline, oil, alcohol, greases and dirt.

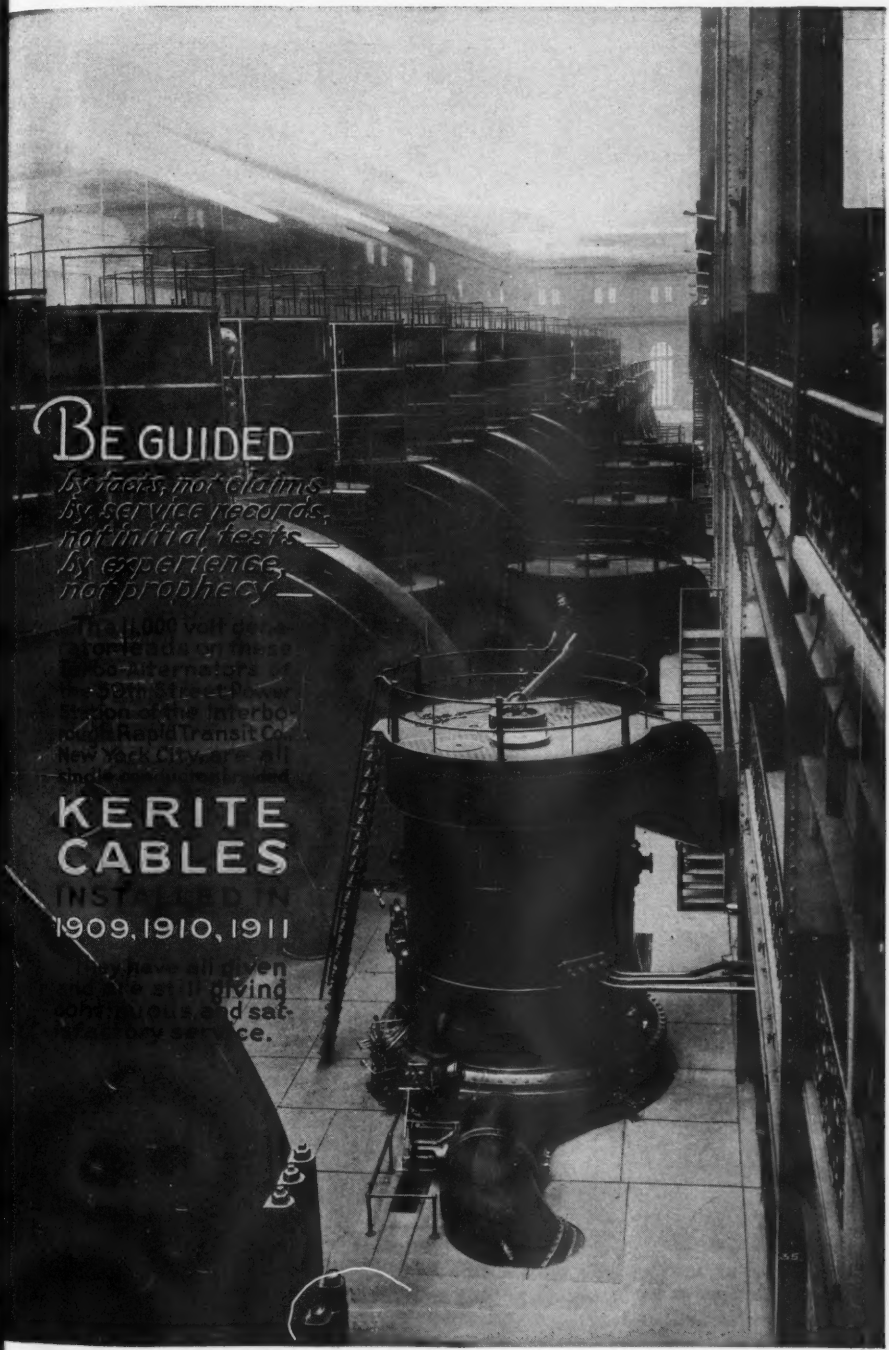
The two and three cell general purpose Industrial Flashlights, 3251 and 3351, have unbreakable lenses, hand-replaceable switches are cased in semi-hard rubber. Safe with "hot stuff." Unaffected by water, oil, gasoline, alcohol, acids or dropping impact. No. 3258, the new Flexible Extension Flashlight, answers the demand for a safe light for inspecting moving machinery, railway journal boxes, drums, barrels, sounding pipes.

NATIONAL CARBON COMPANY, INC.

General Offices: New York, N. Y.; *Branches:* Chicago, San Francisco

Unit of Union Carbide UCC *and Carbon Corporation*

The word "Eveready" is the trade-mark of National Carbon Co., Inc.



The Baton Rouge Electric Co., Baton Rouge, La., uses this powerful 3 to 4-ton International Model D-50 Truck for l and general utility work.

Every Joint Is STR... Than The Pipe Itself

There's no "weak link" in a welded piping system when Grinnell Welding Fittings are used. For these fittings permit every weld to be a plain circumferential butt weld — strong, easily made by any qualified pipe welder.

Take the guesswork out of welded piping by using these fittings. Their properties and working pressure-temperature ratings are identical with the pipe itself. They are seamless — produced by a patented hydraulic forming process—stress-relieve to retain their shape after welding.

For a simple, economical welded piping jo free of ragged sharp corners, slag inside th pipe, nondescript welds — for assurance of clea smooth inside surfaces, specify Grinnell Weldin Fittings. 32-page descriptive catalog on reques Grinnell Company, Inc., Executive Office Providence, R. I. Branch offices in principal citie

WELDING FITTINGS BY **GRINNELL**

WHENEVER **PIPING** IS INVOLVE

Transmission line construction costs can be materially reduced and completion expedited by using Hoosier Crews

HOOSIER ENGINEERING COMPANY

CHICAGO — 46 SO. 5TH ST., COLUMBUS, OHIO — NEW YORK

Canadian Hoosier Engineering Company, Ltd.
Montreal

DIRECTORS OF TRANSMISSION LINES

KINNEAR ROLLING DOORS

I like the way those Kinnear Doors open up out of the way—and stay put! And push button control sure is handy.

WORKMAN

There's no time lost in opening and closing service doors around here, since we put in Kinnear Motor Operated Rolling Doors.

SUPERINTENDENT

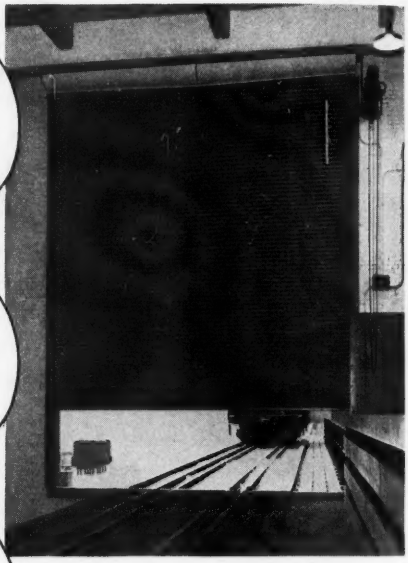
We find we get more value per door dollar with "Kinnears" because they save space, work faster and smoother, and last longer.

PURCHASING AGENT

Door operating and maintenance costs became an insignificant item after we installed Kinnear Rolling Doors.

MANAGER

Let us send you the new catalog of valuable information on door problems and how they can be solved the Kinnear way. Write today!



No wonder Kinnear Rolling Doors get all around approval! They operate with *maximum* efficiency in the *minimum* amount of space—opening upward on a vertical plane, easily and smoothly, and coiling compactly above the opening. They provide the durability of all-steel, plus its protection against fire, weather, intrusion and damage. They save space, time and effort, and cut installation, operation and maintenance costs. Kinnear Rolling Doors are made to fit any opening, can be equipped for motor, mechanical, or manual operation, and can be installed economically in any building, old or new.

The KINNEAR Manufacturing Company
2060-80 FIELDS AVENUE - COLUMBUS, OHIO
Factories: Columbus, Ohio, and San Francisco, California

INDEX TO ADVERTISERS

The Fortnightly lists below the advertisers in this issue for ready reference. Their products and services cover a wide range of utility needs.

*Fortnightly advertisers not in this issue.

PROFESSIONAL DIRECTORY

THE AMERICAN APPRAISAL COMPANY

INVESTIGATIONS • VALUATIONS • REPORTS

PROPERTY EXAMINATIONS AND STUDIES *for*
ACCOUNTING AND REGULATORY REQUIREMENTS

CHICAGO • MILWAUKEE • NEW YORK • WASHINGTON • And Other Principal Cities

---

DESIGN
CONSTRUCTION
OPERATING COSTS

Ford, Bacon & Davis, Inc.

Engineers

RATE CASES
APPRAISALS
INTANGIBLES

VALUATIONS AND REPORTS

CHICAGO PHILADELPHIA NEW YORK DALLAS WASHINGTON

SANDERSON & PORTER

ENGINEERS

VALUATION DEPARTMENT
APPRAISALS AND RATE QUESTIONS

CHICAGO NEW YORK SAN FRANCISCO

BLACK & VEATCH

CONSULTING ENGINEERS

Appraisals, investigations and reports, design and supervision of construction of Public Utility Properties

4706 BROADWAY KANSAS CITY, MO.

JACKSON & MORELAND

ENGINEERS

PUBLIC UTILITIES—INDUSTRIALS
RAILROAD ELECTRIFICATION
DESIGN AND SUPERVISION—VALUATIONS
ECONOMIC AND OPERATING REPORTS

BOSTON NEW YORK

EARL L. CARTER

Consulting Engineer

REGISTERED IN INDIANA, NEW YORK, PENNSYLVANIA, WEST VIRGINIA, KENTUCKY

PUBLIC UTILITY
VALUATIONS AND REPORTS

814 *Electric Building* *Indianapolis, Ind.*

JENSEN, BOWEN & FARRELL

Engineers

Ann Arbor, Michigan

Appraisals - Investigations - Reports
in connection with
rate inquiries, depreciation, fixed capital reclassification, original cost, security issues.

CHENEY AND FOSTER

Engineers and Utility Consultants

61 BROADWAY NEW YORK

SLOAN & COOK

CONSULTING ENGINEERS

120 SOUTH LA SALLE STREET
CHICAGO

Appraisals—Original Cost Studies
Depreciation, Financial, and Other Investigations

● This page is reserved for engineers and engineering concerns especially equipped by experience and trained personnel to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, design and construction. « «

J. W. WOPAT

Consulting Engineer

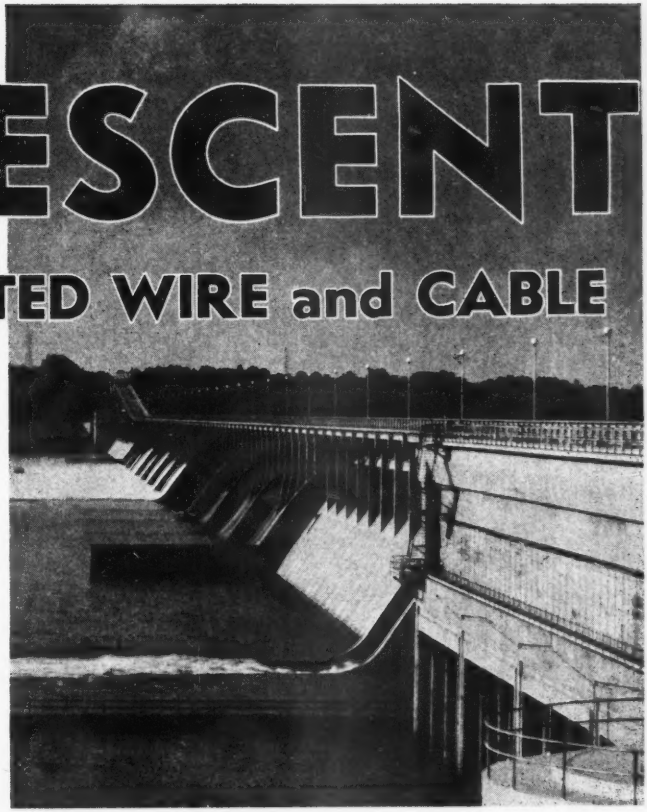
Construction Supervision
Appraisals—Financial
Rate Investigations

303 East Berry St. Fort Wayne, Indiana

CRESCENT

NSULATED WIRE and CABLE

Utilities
Use It!



BBER POWER CABLE
ERVICE ENTRANCE CABLE
SIGNAL CABLE
RNISHED CAMBRIC CABLE
EATHERPROOF WIRE
CONTROL CABLE
DROP CABLE
AD COVERED CABLE
MAGNET WIRE
PARKWAY CABLE

The All-Important Link Between Power Source and Home and Factory

Today, we live electrically—and literally millions of feet of wire and cable, to provide power for industry and current for home lighting and appliances, bear the Crescent name. For wire and cable to meet every electrical need, look to Crescent and its corps of qualified Electrical Wholesale Distributors and Sales Representatives throughout the nation.

CRESCENT
INSULATED WIRE & CABLE CO. INC
TRENTON, NEW JERSEY

All types of Building Wire and all kinds of Special Cables to meet A.S.T.M., A.R.A., I.P.C.E.A., N.E.M.A., and all Railroad, Government and Utility Companies' Specifications.

"Gee! A Nickel Left for Candy"

TOYS or typewriters, lamp bulbs or bathtubs —whenever the cost of an article is lowered through economies in production, more people can buy the article. And those who could buy the article anyway have money left to buy other things.

Take the case of the electric refrigerator. In 1927, when the average model cost about $350, only 375,000 people bought refrigerators. But when, ten years later, improvements in design and manufacturing had brought the price down to $170, *six times as many people* bought refrigerators. And thousands who, perhaps, could have paid the higher price, were able to use the difference to purchase other comforts and conveniences for themselves and their families.

The same has been true of hundreds of other manufactured articles. Because the scien engineers, and workmen of industry hav veloped new products, have improved them, learned how to make them less expensive, millions of people have been able to buy t And by this process, industry has been ab provide the American people with the hi standard of living in the world.

This is an American process in which development of electricity has been and leading factor. You can help to assure its co ued success by placing your business with electrical manufacturers who have the vision the courage to plow back a good share of earnings each year into activities that resu more goods for more people at less cost.

G-E research and engineering have saved the public from ten to one hundred dollars for every dollar they have earned for General Electric

GENERAL ELECTRIC

96-579B